TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]139

HUMP HAIRPIN MANUFACTURING COMPANY,
PLAINTIFF IN ERROR,

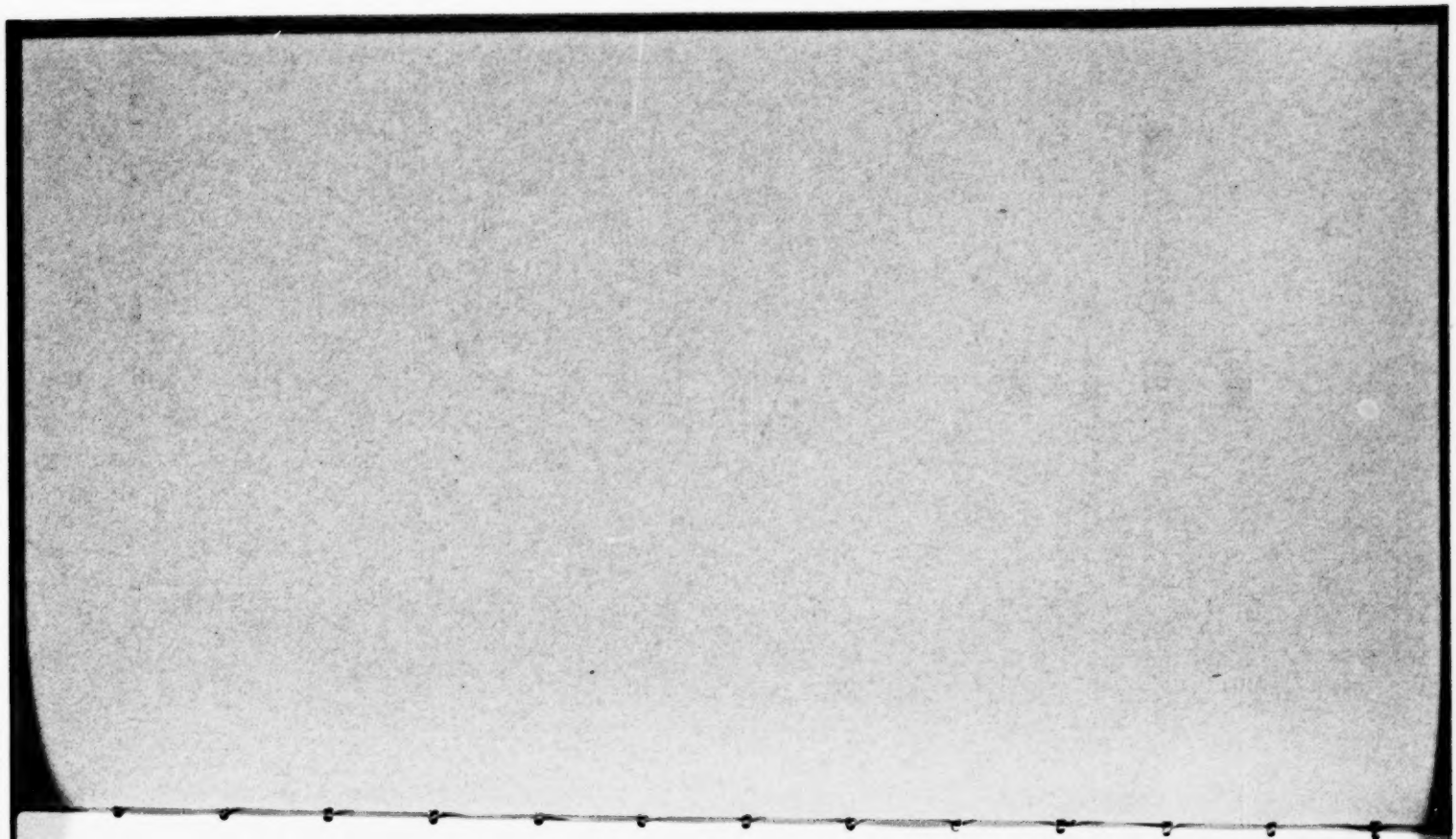
vs.

LOUIS L. EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED SEPTEMBER 15, 1920.

(27,902)



(27,902)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 545.

HUMP HAIRPIN MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

LOUIS L. EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a term of the Supreme Court, begun and held at Springfield on Tuesday, the Sixth day of April in the year of our Lord One Thousand Nine Hundred and Twenty, within and for the State of Illinois.

Present: Frank K. Dunn, Chief Justice; Justice William M. Farmer, Justice James H. Cartwright, Justice Orrin N. Carter, Justice Warren W. Duncan, Justice Clyde E. Stone, Justice Floyd E. Thompson; Edward J. Brundage, Attorney General; Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered, that to-wit, on the 15th day of March, A. D. 1920, the same being one of the days in vacation before the term of Court aforesaid, a record of proceedings had in the Circuit Court of Sangamon County was filed by appellant, Hump Hairpin Manufacturing Company, in the office of the Clerk of the Supreme Court of Illinois in words and figures following, to-wit:

2 13315.

Filed Mar. 15, 1920.
CHAS. W. VAIL,
Clerk Supreme Court.

3 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. E. S. Smith, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court begun and held at the Court House, in the City of Springfield, County and State aforesaid, on the first Monday (the same being the Fourth day) of November, in the year of Our Lord One Thousand Nine Hundred and Eighteen.

Present:

Hon. E. S. Smith, Judge.
C. F. Mortimer, State's Attorney.
J. A. Wheeler, Sheriff.
Chas. L. Koehn, Clerk.

4 Be it remembered that on the 2nd day of October A. D. 1918, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Bill for Injunction: a copy of said bill being in the words and figures as follows to wit:

In the Circuit Court, November Term, 1918.

STATE OF ILLINOIS,
County of Sangamon, ss:

THE HUMP HAIRPIN MANUFACTURING COMPANY

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

To the Honorable Judges of the Circuit Court of Sangamon County, in Chancery Sitting:

Your Orator, The Hump Hairpin Manufacturing Company, brings this bill of complaint against Louis L. Emmerson, as Secretary of State of the State of Illinois, and says:

I.

That Complainant is a corporation organized in the month of September 1914 under the Laws of the State of West Virginia and was originally organized with an authorized capital of $100,000.00, which amount of authorized capital was thereafter, and prior to the 1st day of January 1918, increased to $6,000,000.00, but that
5 only $5,500,000.00 of said capital stock was issued and outstanding at the time when interrogatories were propounded to complainant by the Secretary of State, as herein after mentioned; that on the 17th day of November, A. D. 1914, pursuant to application therefor duly made by Complainant to the then Secretary of State for the State of Illinois, said Secretary of State issued to complainant a license from the State of Illinois to transact business therein, which said license is in the words and figures following, to wit:

State of Illinois,

Department of State,

Lewis G. Stevenson, Secretary of State, to all to whom these presents shall come, Greeting:

Whereas, the Hump Hairpin Manufacturing Company, incorporated under the laws of the State of West Virginia, has filed in the office of the Secretary of the State duly authenticated evidence of its incorporation as provided by law, and has, in all respects, complied with the requirements of law governing Foreign Corporations:

Now therefore, I Lewis G. Stevenson, Secretary of the State of Illinois, in virtue and by authority of law, do hereby certify that said The Hump Hairpin Manufacturing Company, is from the date hereof duly authorized to do business as follows:

To manufacture, purchase, and in any way acquire, to own, hold, sell, mortgage, pledge, export, import, and in any manner dispose of, and generally to manufacture, sell, deal in and handle hairpins and analogous devices, and all goods, wares and merchandise of every kind and description whatever, and all machinery, appliances or devices used in the production or manufacture of the aforesaid articles.

To purchase, lease or otherwise acquire and to hold, own, use operate, promote, and otherwise turn to account, and to sell, assign, rent rights and grant licenses thereunder, or otherwise dispose of any and all inventions, patented or otherwise, in the United States, and in foreign countries, trademarks, trade names, copyrights, secret processes, which may pertain to or be useful in the business of said corporation or any of the branches thereof.

And I do further certify: That the attached are true copies of all the papers filed in connection with the application of the above corporation for this certificate was made a part hereof, including the application, interrogatories and answers, and certified copy of the charter, all of which are attached to the duplicate original of this certificate now on file in this office; that said corporation has paid a fee of $70.00 on ¼ or $25.00, in amount of its capital stock; and that said corporation is hereby authorized to do business subject to the limitations imposed by law and by this certificate, in the State of Illinois for a term of 19¾ years and is entitled to all the rights and privileges granted to Foreign Corporations under the laws of this State.

In testimony whereof, I hereunto set my hand and cause to be affixed the Great Seal of State. Done at the City of Springfield this Seventeenth Day of November, A. D. 1914, and of the Independence of the United States the one hundred and Thirty ninth.

LEWIS G. STEVENSON,
Secretary of State.

and that complainant paid to said Secretary of State the sum of Seventy ($70.00) Dollars, being the amount of license fee then prescribed by law of the State of Illinois and required by said Secretary of State, and said fee was accepted by the Secretary of State in full settlement and satisfaction of the amount due from complainant in order to entitle it to transact business in the State of Illinois for the term of years and upon the terms specified in said license above set forth.

II.

That after the issuance of said license and authority, and relying thereon, complainant began to transact business in the State of Illinois and thereafter began to transact and has ever since transacted and is now transacting a large volume of business with citizens and

residents of other states than the State of Illinois; that the business of complainant is the manufacture, shipment and sale of wire hairpins of all kinds, and that said business is conducted as follows: Complainant conducts and maintains a manufacturing establishment in the City of Chicago in the State of Illinois and employs a large number of employees in and about the manufacture of said hairpins, and also maintains a force of traveling salesmen who travel in the various states of the United States of America, who solicit orders from wholesalers and jobbers in said states and which said orders are mailed to complainant at its office in Chicago, and thereupon when said orders are accepted, shipment of complainant's said products are made either by express, railroad freight or mail to the respective purchasers and consignees thereof by through shipment to the postoffice address and residence of said consignees in said various states, from which the orders for said products have originated, and that such has continuously been the method of conducting its business by complainant since it began to manufacture said products.

III.

That pursuant to the provisions of an Act of the Legislature of the State of Illinois entitled "An Act to regulate the admission of foreign corporations for profit to do business in the State of Illinois, approved May 18, 1905, in force July 1, 1905," as subsequently amended by an Act approved June 22, 1917 and in force July 1, 1917, by which said Act it is attempted to authorize the Secretary of State of Illinois to assess against complainant additional fees for the privilege of continuing to do business in the State of Illinois under its said license, said additional fee so assessed to be based upon the amount and value of its tangible property and the business transacted by complainant in the State of Illinois, the said Louis L. Emmerson, as Secretary of State, propounded, under date of February 28, 1918, certain interrogatories to be answered by an officer of complainant, and that within extension of time granted by said Secretary of State for that purpose complainant filed in the office of said Secretary of State its amended answers to said interrogatories on or about the 4th day of September, A. D. 1918, from which amended answers to interrogatories it appears, as the fact was and is, that the total tangible property of complainant was located in the State of Illinois and that the percentage of said tangible property so located was 100 per cent, and from which amended answers it also appeared, as the fact was, that for the fiscal year of complainant last expired before said interrogatories were so propounded by said Secretary of State the total business transacted by complainant in all the states of the Union, including the State of Illinois, amounted to $169,712.95 and that the amount of business transacted in the State of Illinois alone amounted to the sum of $3,645.00, and that therefore the amount of business transacted by complainant in the State of Illinois amounted to 2.13 per cent of the total business transacted by complainant in all the states,

and that 97.87 per cent of complainant's total business represented the sale and through shipment of complainant's products from its factory in Chicago, Illinois to purchasers and consignees at various points in other states, and represented inter-state commerce transactions and not business transacted in the State of Illinois.

IV.

Complainant further avers that if said Act of the Legislature as amended is constitutional and valid, which Complainant denies, then it was the duty of the Secretary of State under said Act to ascertain the amount of complainant's capital stock represented in the State of Illinois, by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in said state, but that instead of averaging said percentages in the manner prescribed by said Act, said Secretary of State asserted, and continues to assert,

10 IV-*a*.

Complainant further avers that since the issuance to it of the license aforesaid, it has continuously been assessed by the taxing authorities of the State of Illinois upon all of its tangible property situate in said State, and has paid all taxes levied against it, and that the tax demanded by the Secretary of State is in addition to the property taxes so paid by Complainant and not in lieu thereof.

That all of complainant's business was transacted in the State of Illinois, and has adopted as a basis for ascertaining the proportion of complainant's capital stock represented in the State of Illinois, 100 per cent of complainant's business transacted in all the states as well as 100 per cent of its tangible property, and has further computed said tax upon the basis of a capitalization of $6,000,000.00, although of said authorized capital $500,000.00 was in the treasury of complainant and not outstanding when said interrogatories were propounded and was therefore not represented either by any business transacted or by any tangible property owned by complainant in the State of Illinois or elsewhere, and upon said basis and by said method of computation the said Secretary of State avers that the total fee payable by complainant under said Acts amounts to the sum of $6,045.00, and after giving credit to complainant for the sum of $70.00 heretofore paid, demands that complainant pay a further license fee of $5,975.00 as a condition of continuing to do business in the State of Illinois, and threatens that unless complainant complies with said demand by the 4th day of October, A. D. 1918, that he will revoke complainant's license to transact
11 business in the State of Illinois, and that by reason of said threat complainant will be unduly prejudiced unless a temporary writ of injunction issue without notice and as hereinafter prayed.

V.

Complainant further avers that if said Act is constitutional and valid, which complainant denies, that by averaging the percentages of the total business of complainant transacted in Illinois with the percentage of the total tangible property located in said state, said percentages being respectively 2.13 per cent and 100 per cent, the resulting percentage of the outstanding capital stock of complainant represented in the State of Illinois is 51.07 per cent, and that the proportion of complainant's capital stock represented in the State of Illinois as the result of the application of the percentage last named is $2,808,850.00, and the amount of tax assessable against said complainant under said Act and the Laws of the State of Illinois is the sum of $2,853.85, and complainant having already paid the sum of $70.00, the balance due from complainant would be the sum of $2,783.85, which said amount the complainant is ready and willing to pay or to bring into Court, as the Court may direct, in the event that the Court holds said Act of the Legislature as amended to be constitutional and valid.

VI.

Complainant further avers that if the method and basis of computation of said license tax adopted by the Secretary of State is in accordance with the true interpretation of said Act, as amended, which however complainant denies, then said Act is unconstitutional and void because it imposes a direct and material burden upon inter-state commerce, in violation of Paragraph Third of Section 8, of Article I of the Constitution of the United States.

VII.

Complainant is advised and asserts that said Act approved June 22, 1917, in force July 1, 1917, is unconstitutional and void, in that it discriminates between domestic corporations organized under the laws of the State of Illinois and foreign corporations, including complainant, theretofore admitted to and authorized to do business in the State of Illinois under and by virtue of the said Foreign Corporations Act approved April 22, 1899 and in force July 1, 1899, and the other laws in force when said license was issued to complainant by imposing different liabilities on foreign corporations from those imposed on domestic corporations, and also in that it changes the basis for fixing the amount of the fees required to be paid for the right to do or to continue to do business in this State. Complainant is advised and asserts that the license issued to it on November 17, 1914, upon the payment of the required fee therefor, under the laws of the State of Illinois then in force amounted to a contract that complainant should have the right to come into the State of Illinois and do business therein for 49 3/4 years and to be subjected to no greater liabilities, restrictions and obligations than were or thereafter might

be imposed on domestic corporations of like character, and the said Act of June 22, 1917, purporting to authorize an assessment of an additional fee by said Louis L. Emmerson, Secretary of State, against complainant and upon a different basis, violates the obligation of said contract between complainant and the State of Illinois in
13 violation of Section Ten, Article One of the Constitution of the United States prohibiting States from passing any law impairing the obligation of contracts, denies to complainant the equal protection of the laws and takes complainant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

VIII.

Complainant further alleges that the cancellation of its license and authority to do business in the State of Illinois so threatened by the said Secretary of State, would result in irreparable injury to it, in that it could no longer operate its property, plants and establishment in the State of Illinois, could not sue in the Courts of the State of Illinois, its organization of workmen, mechanics and employees will be disorganized and could not be reassembled and reorganized, many of its contracts with its customers could not be filled, the title to its property would be clouded, and in other respects it would be injured, and complainant would be subjected to penalties and vexatious litigation with respect to the same.

Complainant therefore prays that said Louis L. Emmerson, Secretary of State, who is made Defendant to this bill, may be required to answer to same, but not under oath, his answer under oath being hereby waived; that this Court may grant a preliminary injunction prior to hearing on said bill and after hearing a permanent injunction, enjoining and restraining said defendant from forfeiting, annulling, cancelling, declaring void, revoking or otherwise interfering in any way with the authority and license of complainant to do business in the State of Illinois or from declaring complainant without authority to do business in the State of Illinois, and that
14 complainant may have such other further relief as may be equitable.

May it please Your Honors to grant the writ of summons in chancery, directed to the Sheriff of Sangamon County, Illinois, commanding him that he summons the defendant, Louis L. Emmerson, as Secretary of State of the State of Illinois, to appear before, the said Court on the First day of the next November Term thereof, to be held at the Court House in Springfield, in the County of Sangamon, and then and there to answer this bill, etc.

THE HUMP HAIRPIN MANUFACTURING COMPANY,
By ALLEN, HUMPHREY AND CONVERSE,
Its Solicitors.

STATE OF ILLINOIS,
County of Sangamon, ss:

Fred A. Caton, being first duly sworn, on oath states that he is the Secretary of The Hump Hairpin Manufacturing Company, complainant in the above entitled cause; that he is advised and informed, and so states the fact to be, that the rights of the Complainant will be unduly prejudiced if the injunction in this cause is not issued immediately or without notice to the defendant, and that unless a temporary writ of injunction is issued the Secretary of State will revoke the license and authority of the complainant to transact business in the State of Illinois.

FRED A. CATON.

Subscribed and sworn to before me this 1st day of October 1918.
[Notarial Seal.] JEANETTE KNOBLOCH,
Notary Public.

15 STATE OF ILLINOIS,
County of Sangamon, ss:

Fred A. Caton, being first duly sworn, on oath deposes and says that he is the Secretary of the complainant corporation, and that he has read said Bill of Complaint and knows the contents thereof, and that the same is true.

FRED A. CATON.

Subscribed and sworn to before me this 1st day of October 1918.
[Notarial Seal.] JEANETTE KNOBLOCH,
Notary Public.

16 And afterwards, to wit, on the 2nd day of October A. D. 1918, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain order granting writ of injunction: a copy of said order being in the words and figures as follows to wit:

In the Circuit Court, November Term, 1918.

STATE OF ILLINOIS,
County of Sangamon, ss:

THE HUMP HAIRPIN MANUFACTURING COMPANY

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Upon the reading of the Bill of Complaint, it is ordered that a temporary writ of injunction issue in the above entitled cause, as prayed in said Bill, restraining the Defendant, Louis L. Emmerson, as Secretary of State of the State of Illinois, until further order of

this Court, from forfeiting, annulling, cancelling, declaring void, revoking, or otherwise interferring in any way with the authority and license of Complainant, The Hump Hairpin Manufacturing Company, to do business in the State of Illinois, or from declaring complainant without authority to do business in said state, upon complainant giving bond in the sum of Sixty Five Hundred
17 Dollars.

Dated this 2nd day of October A. D. 1918.

Enter.

E. S. SMITH,
Judge.

And afterwards, to wit on the 3rd day of October A. D. 1918 there was issued out of the office of the Clerk of the Sangamon County Circuit Court, a certain summons in chancery; a copy of said summons, together with the endorsements of the Sheriff thereon being in the words and figures as follows to wit:

18 STATE OF ILLINOIS,
Sangamon County, ss:

The People of the State of Illinois to the Sheriff of Sangamon County, Greeting:

We command you to summon Louis L. Emmerson, Secretary of State of the State of Illinois, if he be found in your County, to appear before the Circuit Court of Sangamon County, on the first day of the next term thereof, to be holden at the Court House, in the City of Springfield, on the first Monday in the month of November A. D. 1918 to answer unto a bill in Chancery filed in the office of the Clerk of the Circuit Court of Sangamon County against him by The Hump Hair Pin Manufacturing Company, Complainant, and hereof make due return to said Court as the law directs.

Witness, Chas. L. Koehn, Clerk of said Court, and the Judicial Seal thereof, at Springfield, this 3rd day of October A. D. 1918.

[Official Seal.] CHAS. L. KOEHN,
Clerk.

19 Reverse Side.

STATE OF ILLINOIS,
Sangamon County, ss:

I have served the within summons on the within named Louis L. Emmerson, Secretary of State of the State of Illinois by reading the same and delivering a true copy to him this 5th day of October 1918.

I cannot find in my County —— ——, this — day of ——, 19—.

JOHN A. WHEELER,
Sheriff of Sangamon County, Illinois.

Sangamon County Circuit Court.

To November Term, A. D. 1920.

THE HUMP HAIR PIN MANUFACTURING COMPANY

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Summons in Chancery.

Sheriff's Fees.

Service of Summons	$.65
Returning Summons	.10
Making Copy	.10
— Miles Travel	.10
Total Amount	.95

Filed Oct. 17, 1919.
CHAS. L. KOEHN,
Clerk Sheriff of Sangamon County, Illinois.
ALLEN & CONVERSE,
Complainant's Solicitor.

20 And afterwards to-wit on the 3rd day of October A. D. 1918, there was issued out of the office of the Clerk of the Sangamon County Circuit Court, a certain Writ of Injunction; a copy of said Writ of Injunction, together with the endorsements of the Sheriff thereon being in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

The People of the State of Illinois to Louis L. Emmerson, Secretary of State of the State of Illinois, Greeting:

You, the said Louis L. Emmerson, Secretary of State of the State of Illinois, and each of you clerks, deputies, agents, attorneys, servants and employes, or successors in office, are hereby commanded, enjoined and restrained from forfeiting, annulling, cancelling, declaring void, revoking, or otherwise interferring in any way with the authority and license of complainant, The Hump Hair Pin Manufacturing Company, to do business in the State of Illinois, or from declaring complainant without authority to do business in said State; and you, the said Louis L. Emmerson, Secretary of State of the State of Illinois, and each of you clerks, deputies, agents, attorneys, servants and employes, or successors in office, are commanded, enjoined and restrained, as aforesaid, until the matters and things set forth

and contained in a Bill or Petition in Chancery, this day filed in the office of the Circuit Court of Sangamon County, and State of Illinois, wherein The Hump Hair Pin Manufacturing Company is Complainant and Louis L. Emmerson, Secretary of State of the State of
21 Illinois is Defendant, can be heard and determined in equity, or until the further order of the Sangamon County Circuit Court in the premises, and this order or injunction, you the said Louis L. Emmerson, Secretary of State of the State of Illinois and each of you clerks, deputies, agents, attorneys, servants and employes, and successors in office, are to obey, keep, observe, and abide by, and in no wise omit so doing under the pains and penalties of the law.

To the Sheriff of said County, to execute and return in due form of law.

Witness, Chas. L. Koehn, Clerk of said Court, and the Judicial Seal thereof, at Springfield this 3rd day of October A. D. 1918.

[Official Seal.] CHAS L. KOEHN,
Clerk.

Reverse Side.

STATE OF ILLINOIS,
County of Sangamon, ss:

I have served the within writ by reading the same to and delivering to and leaving a true copy thereof with Louis L. Emmerson, Secretary of State of the State of Illinois, this 5th day of October A. D. 1918.

JOHN A. WHEELER,
Sheriff.

$.95.

Sangamon County Circuit Court.

To November Term, 1918.

THE HUMP HAIR PIN MANUFACTURING COMPANY

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Writ of Injunction.

ALLEN & CONVERSE,
Plaintiff's Attorneys.

22 And afterwards to wit on the 5th day of October A. D. 1918, there was filed an Injunction Bond and was approved by the Court: a copy of said Injunction Bond being in the words and figures as follows to wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, November Term, 1918.

THE HUMP HAIRPIN MANUFACTURING COMPANY
vs.
LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Know all men by these presents:

That we, The Hump Hairpin Manufacturing Company, as principal and National Surety Company, as Surety, are held and firmly bound unto the People of the State of Illinois, for the use of Louis L. Emmerson, as Secretary of State of the State of Illinois, in the penal sum of Six Thousand Five Hundred ($6,500.00) Dollars, for the payment of which well and truly to be made we hereby jointly and severally bind ourselves, our successors and assigns firmly by these presents.

Sealed with our seals, and dated this 4th day of October, A. D. 1918.

The Conditions of the Above Obligation is such that, whereas the said The Hump Hairpin Manufacturing Company has commenced its suit against the above named defendant and therein prayed for a preliminary injunction pending the final hearing of said cause, and whereas the Honorable E. S. Smith, Judge of said Court, has
23 granted said prayer for said preliminary injunction upon condition that the said complainant shall cause to be executed a good and sufficient bond in the sum of Six Thousand Five Hundred ($6,500.00) Dollars, conditioned as the law requires.

Now, therefore, if the said Hump Hairpin Manufacturing Company shall obey all orders of Court which may be entered herein and shall pay the amount of all taxes which may be found and adjudged to be due from it, and shall pay all costs and damages which may be awarded to said defendant in case it shall be finally determined that said order was improperly granted or said writ of injunction improperly issued, not exceeding the sum of $6,500.00, then this obligation to be null and void, otherwise to be and remain in full force and effect.

[Corporation Seal.]

THE HUMP HAIRPIN MANUFACTURING COMPANY,
By SCOTT GOLDBERG, [Corporate Seal.]
Pres.
NATIONAL SURETY COMPANY,
By EMIL L. LEDERER, *Resident Vice-President.*

Attest:

[Corporate Seal.]

ROBERT E. STITT,
Resident Assistant Secretary.

Approved.
E. S. SMITH,
Judge.

STATE OF ILLINOIS,
County of Cook, ss:

I, Ed. H. Kessberger, a Notary Public of Cook County, in the State of Illinois, do hereby certify that Emil L. Lederer Resident Vice-President, and Robert E. Stitt Resident Assistant Secretary, of National Surety Company, who are personally known to me to
24 be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered said instrument, for and on behalf of National Surety Company for the uses and purposes therein set forth.

Given under my hand and notarial seal in my office in the City of Chicago, in said County, this 4th day of October A. D. 1918.

[Notarial Seal.] ED. H. KESSBERGER,
Notary Public.

And afterwards to wit, on the 28th day of October, A. D. 1918, the same being one of the term days of the September Term, A. D. 1918, of the Sangamon County Circuit Court, the following Order was had and entered of record, to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

25 And afterwards to-wit on the 8th day of November A. D. 1918, the same being one of the term — of the November Term A. D. 1918 of the Sangamon County Circuit Court, the following proceeding was had and entered of record to-wit:

THE HUMP HAIRPIN MANUFACTURING COMPANY, Complainant,

vs.

LOUIS L. EMMERSON, Secretary, etc., Defendants.

Bill.

Upon motion of the complainant by its solicitors, leave is hereby given it to amend the bill of complaint.

26 And afterwards to wit, on the 8th day of November A. D. 1918, at the time leave is given the complainant to file an Amendment to the Bill there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Amendment to the Bill: a copy of the said Amendment being in the words and figures as follows to wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, November Term, 1918.

THE HUMP HAIRPIN MANUFACTURING COMPANY

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Amendment to Bill.

Now comes the Complainant, and leave of Court first had and obtained, amends its Bill of Complaint, as follows:

(1) Substitute for $169,712.95, wherever the same occurs in the bill $260,334.96.

(2) Substitute For $3,645.00, wherever the same occurs in the bill, $25,814.00.

(3) Substitute for $2,808,850.00, wherever the same occurs in the bill, $3,022,250.00.

27 (4) Substitute for $2,853.85, wherever the same occurs in the bill $3,067.25.

(5) Substitute for $2,783.85, wherever the same occurs in the bill, $2,997.25.

(6) Substitute for 2.13 per cent, wherever the same occurs in the bill, 9.90 per cent.

(7) Substitute for 97.87 per cent, wherever the same occurs in the bill, 90.10.

(8) Substitute for 51.07 per cent, wherever the same occurs in the bill, 54.95 per cent.

ALLEN AND CONVERSE,
Solicitors for Complainant.

28 And afterwards to wit, on the 3rd day of January A. D. 1919, the same being one of the term days of the November Term A. D. 1918 of the Sangamon County Circuit Court, the following Order was had and entered of record, to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

29 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. E. S. Smith, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court begun and held at the Court House, in the City of Springfield, County and State aforesaid, on the first Monday (the same being the Sixth day) of January, in the year of Our Lord One Thousand Nine Hundred and Nineteen.

Present:

Hon. E. S. Smith, Judge.
C. F. Mortimer, State's Attorney.
Henry Mester, Sheriff.
Chas. L. Koehn, Clerk.

30 And afterwards to-wit on the 11th day of January A. D. 1919, the same being one of the term days of the January Term A. D. 1919 of the Sangamon County Circuit Court, the following proceeding was had and entered of record to-wit:

THE HUMP HAIRPIN MANUFACTURING COMPANY, Complainant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Defendant.

Bill.

By leave of Court had and obtained the defendant by the Attorney General withdraws the demurrer to the amended bill heretofore filed; and upon motion of the said defendant by his solicitor, leave is hereby given him to answer instanter and the answer is now filed.

31 And afterwards to wit, on the 11th day of January A. D. 1919, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain answer; a copy of said answer being in the words and figures as follows to wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Sangamon County Circuit Court.

No. 35606.

THE HUMP HAIRPIN MANUFACTURING COMPANY, a Corporation, Complainant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Defendant.

The Answer of the Defendant, Louis L. Emmerson, Secretary of State, to the Bill of Complaint as Amended of the Hump Hairpin Manufacturing Company, Complainant.

Now comes Louis L. Emmerson, Secretary of State of the State of Illinois, defendant in the above entitled cause, by Edward J. Brundage, Attorney General, and Clarence N. Boord, Assistant Attorney General, and for answer to the bill of complaint, as amended, of complainant, answering says:

1. The defendant admits that the complainant is a corporation organized on or about, to wit, September 1914, and that said
32 complainant was originally organized with an authorized capital stock of $100,000 which amount of authorized capital stock was thereafter, and prior to January 1, 1918, increased to $6,000,000, but that only $5,500,000 of said capital stock was issued and outstanding at the time when the interrogatories were propounded to the complainant by the Secretary of State, which said interrogatories are mentioned and referred to in the bill of complaint and are hereafter mentioned and set forth herein.

This defendant admits that on the 17th day of November A. D. 1914, pursuant to application therefor duly made by the complainant to the then Secretary of State for the State of Illinois, said Secretary of State issued to complainant a license or certificate of authority from the State of Illinois authorizing it to transact business in the State of Illinois, which said license or certificate of authority is correctly set forth in and by the bill of complaint, as amended.

This defendant admits that the complainant paid to the said Secretary of State Seventy Dollars ($70.00), being the amount of the fee then prescribed by the law of the State of Illinois and required by said Secretary of State. But this defendant denies that said fee was accepted by the said Secretary of State in full settlement and satisfaction of the amount due from complainant in order to entitle it to transact business in the State of Illinois for the term of years set forth in said license or certificate of authority. But, on the contrary, this defendant says that the complainant was and is by said license or

certificate of authority authorized to do business subject to the limitations imposed by law and by said certificate on the State of
33 Illinois for a term of 49 3/4 years, and was and is entitled to all the rights and privileges granted to foreign corporations under the laws of the State of Illinois, and to no other rights whatsoever.

2. The defendant admits that after the issuance of said license or certificate of authority the complainant began to transact business in the State of Illinois, and thereafter began to transact and has ever since transacted and is now transacting a large volume of business with citizens and residents of other states than the State of Illinois. This defendant admits that the business of complainant is the manufacture, sale and shipment of wire hairpins of all kinds and that said business of the complainant is conducted substantially as follows: Complainant conducts and maintains a manufacturing establishment in the City of Chicago, in the State of Illinois, and employs a large number of employees in and about the manufacture of said hairpins, and also maintains a force of traveling salesmen who travel in the various states of hte United States of America, and who solicit orders from wholesalers and jobbers in said States, which orders are mailed to complainant at its office in Chicago, and thereupon, when said orders are accepted, shipments of complainant's said products are made either by express, railroad freight or mail to the respective purchasers and consignees thereof by through shipment to the post office address and residence of said consignees in said various states from which the orders for said products have originated, and that such has continuously been the method of conducting its business by the complainant since it began to manufacture its said prod-
34 ucts.

This defendant further says that the complainant, up to the time of the filing of this bill of complaint, did not have or maintain any other factory or manufacturing establishment than the said manufacturing establishment in Chicago, as aforesaid; that said complainant did not have or maintain any other office for the transaction of the business which it is authorized to engage in and transact, including the sale of its said products, than its office in the City of Chicago and State of Illinois; and that all of its said orders for its products were received and accepted at, and filled from, its office and factory or storerooms, respectively, in the City of Chicago and State of Illinois.

The defendant further says that all of the officers of the complainant have resided and now reside in the City of Chicago and State of Illinois.

3. The defendant admits that under date of February 28, 1918, as Secretary of State of the State of Illinois, he propounded certain interrogatories to be answered by an officer of the complainant and that within the extention of time granted by him for that purpose the complainant filed in the office of the Secretary of State its amended

answers to said interrogatories, on or about the 4th day of September, A. D. 1918.

This defendant admits that said interrogatories were propounded to the said complainant pursuant to and in accordance with the provisions of an act of the General Assembly of the State of Illinois, entitled "An Act to regulate the admission of foreign corporations for profit to do business in the State of Illinois" approved May 18, 1905, in force July 1, 1905, as subsequently amended by an act of the said General Assembly, approved June 22, 1917, in force July 1, 1917.

This defendant says that said interrogatories so propounded and the amended answers thereto so filed, as aforesaid were and are as follows:

Int. 1. State your name and official position with the above Corporation.

Answer. Sol H. Goldberg, President.

Int. 2. State total of all the property of the corporation. Specifying:

(*a*) Value of the patent rights, licenses, trademarks, secret processes, copyrights and and good will:

Answer. $5,124,126.72—potential value only—market value nominal. (*b*) None. (*c*) Merchandise, raw materials and goods in process of manufacture:

Answer. $181,016.97.

(*d*) Book accounts and notes:

Ans. $23,736.63.

(*e*) Machinery:

Ans. $4,000.00.

(*f*) None.

(*g*) Furniture, fixtures, stationery, etc.

Ans. $1,060.32.

(*h*) Cash in Bank.

Ans. $10,737.86.

(*i*) None.

Int. 3. What is the value of the tangible or physical property of the corporation in Illinois, including real estate but not leasehold interests therein?

Answer. $186,077.29.

Int. 4. What is the value of the leaseholds in real estate of the corporation located in Illinois?

Answer. $10,000.00.

Int. 5. What was the total annual business of the corporation for the past year?

Answer. $260,334.96—Calendar year 1917.

Int. 6. Give the location of the principal places of business of the corporation and the amount of business transacted through each last year?

Answer. 1918 Prairie Avenue, Chicago. $260,334.96 of this amount $24,814.00 represents business done with residents of Illi-

nois. The balance of $234,520.96 represents business done with the residents of States other than Illinois.

Int. 7. Give an estimate of the annual business transacted by the Corporation at or from places of business in Illinois.

Answer. $260,334.96.

Int. 8. What is the amount of annual sales made to residents of Illinois?

Answer. $25,814.00 in 1917.

Int. 9. In what states is the corporation licensed to do business?

Answer. Illinois—West Virginia.

Int. 10. State briefly the nature of the business being transacted by the corporation.

Answer. Manufacture and sale of hairpins and hairpin machinery.

Int. 11. What is the amount of the capital stock authorized by the charter of the corporation? Number of Shares?

Answer. Sixty Thousand Shares—being 15,000 preferred and 45,000 common—$6,000,000.00.

Int. 12. What amount of the capital is paid in?

Answer. $5,500,000.00.

Int. 13. From what office is the affairs of the corporation managed.

37 Answer. Chicago.

Int. 14. To what office or offices are all contracts with the corporation forwarded for final acceptance?

Answer. Chicago.

Int. 15. Is the corporation actually transacting business at the present time in the State where it was organized?

Answer. Yes.

STATE OF ILLINOIS,
County of Cook, ss:

Sol H. Goldberg, being first duly sworn, on oath says that he is President of the above corporation; that he has read the answers to above interrogatories subscribed by him and that the same are true.

SOL H. GOLDBERG.

Subscribed and sworn to before me, an officer authorized by the laws, of the State of Illinois to administer oaths, this 3rd day of Sept. A. D. 1918.

[SEAL.] CLARENCE J. BASSLER,
Notary Public.

This defendant admits that from said amended interrogatories it appeared, and that the fact is, that the total tangible property of the complainant was located in the State of Illinois and that the percentage of said tangible property so located was one hundred

38 (100) per cent. But this defendant denies that it appears from the said amended answers to said interrogatories, or

that the fact is, that for the fiscal year of complainant last expired before said interrogatories were so propounded by the Secretary of State the amount of business transacted in the State of Illinois amounted only to the sum of $25,814, but on the contrary it appears from the answers to said interrogatories, and the fact is, that during said fiscal year the total business of the complainant transacted in the State of Illinois amounted to $260,334.96. This defendant further denies that the amount of business transacted by complainant in the State of Illinois amounted to nine and nine-tenths (9.9) per cent of the total business transacted by the defendant in all the states, and denies that ninety and one tenth (90.1) per cent of complainant's total business was not transacted in Illinois, under and within the meaning of the provision of said "Act to regulate the admission of foreign corporations for profit to do business in the State of Illinois", approved May 18, 1905, in force July 1, 1905, as subsequently amended, as aforesaid.

4. The defendant admits that it was the duty of the Secretary of State under the act of 1905, as subsequently amended, to ascertain the amount of the complainant's capital stock by averaging the percentage of the total business of the corporation transacted in the State of Illinois with the percentage of the total tangible property located in the State, and says that he has performed the said duty and has averaged said percentage in the manner prescribed by the said act.

The defendant admits that he has asserted, and does still assert, that all of the complainant's said business was transacted in the State of Illinois, and that he has adopted as a basis for as-
39 certaining the proportion of the complainant's capital stock represented in the State of Illinois one hundred (100) per cent of the complainant's business, all of which business the defendant says was transacted in the State of Illinois.

The defendant admits that he has computed the said fee upon the basis of the complainant's authorized capital stock of $6,000,000. He further admits that upon said basis and by said method of computation he has fixed the total fee payable by the complainant under the said act at the sum of $6,045 and after giving credit to the complainant for the sum of $70.00, heretofore paid, and that he demands that the complainant pay a further fee of $5,975 as a condition of continuing to do business in the State of Illinois, and that he stated to the complainant that unless the complainant complied with said demand by the 1th day of October A. D. 1918, he would revoke the complainant's license or certificate of authority to transact business in the State of Illinois.

5. The defendant is not informed, save by the bill of complaint, as amended, whether the complainant, since the issuance to it of the license or certificate of authority aforesaid has continuously been assessed by the taxing authorities of the State of Illinois upon all its tangible property situate in said state, and has paid all taxes levied against it, but the defendant assumes these statements to be true and

for the purposes of this suit admits the same to be true, and for said purposes the defendant admits that the fee demanded by the Secretary is in addition to the property taxes so paid by complainant and not in lieu thereof.

5. The defendant denies that by averaging the percentages of the total business of the complainant transacted in Illinois with the percentage of the total tangible property located in the State, the resulting percentage of outstanding capital stock of complainant represented in the State of Illinois is fifty four and ninety five hundredths (54.95) per cent; denies that the proportion of the complainant's capital stock represented in Illinois is $3,022,250; and denies that the amount of fees assessable against said complainant under said act and the laws of the State of Illinois is $3,067.25, and that deducting therefrom the sum of $70 already paid by the complainant, the balance due from the complainant is $2,997.25.

6. The defendant denies that if the method and basis of computation of the said fee adopted by the Secretary of State is in accordance with the true interpretation of said act, as amended, said act, as amended, is unconstitutional and void because it imposes a direct and material burden upon interstate commerce, in violation of the third paragraph of section 8 of article I of the constitution of the United States, or for any other reason.

7. The defendant denies that the said act approved June 22, 1917, in force July 1, 1917, is unconstitutional and void, in that it discriminates between domestic corporations organized under the laws of the State of Illinois and foreign corporations, including complainant, therefore admitted to do business in the State of Illinois under and by virtue of the said Foreign Corporation act, approved April 22, 1899, in force July 1, 1899, and the other laws in force when said license was issued to complainant, by imposing different liabilities on foreign corporations from those imposed on domestic corporations. The defendant denies that the act of June 22, 1917 is unconstitutional and void, in that it changes the basis for fixing the amount of the fees required to be paid for the right to do or to continue to do business in this State.

The defendant admits that the said license or certificate of authority issued to the complainant on November 17, 1914, upon the payment of the required fee therefor, under the laws of the State of Illinois then in force, amounted to a contract that the complainant should have the right to come into the State of Illinois and do business therein for 49¾ years, and to be subjected to no greater liabilities, restrictions and obligations than were then or thereafter might be imposed upon domestic corporations of like character. But this defendant denies that the said act of June 22, 1917, which authorizes an assessment of an additional fee by the Secretary of State, fixes a different basis from that fixed by the act which it mends, and he denies that said act of June 22, 1917, violates the obligation of said contract between the complainant and the State of Illinois, contrary

to section 10 of article I of the constitution of the United States, which prohibits the States from passing any law impairing the obligations of contracts. This defendant denies that the said act of June 22, 1917, denies to the complainant the equal protection of the laws and takes the complainant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The defendant denies that the complainant is entitled to the injunctions prayed for in the bill of complaint, as amended, or to any relief whatsoever, and prays that the preliminary injunction heretofore issued in that cause be dissolved and the bill of Com-
42 plain*ant*, as amended, dismissed for want of equity.

LOUIS L. EMMERSON,
Secretary of State, Defendant.

EDWARD J. BRUNDAGE,
Attorney General;
CLARENCE N. BOORD,
Assistant Attorney General,
Solicitors for the Defendant.

43 And afterwards, to wit on the 27th day of February, A. D. 1919, the same being one of the term days of the January Term A. D. 1919, of the Sangamon County Circuit Court, the following order was had and entered of record, to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

41 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. Frank W. Burton, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (the same being the Third day) of March, in the year of Our Lord One Thousand Nine Hundred and Nineteen.

Present:

Hon. Frank W. Burton, Judge.
C. F. Mortimer, State's Attorney.
Henry Mester, Sheriff.
Chas. L. Koehn, Clerk.

45 And afterwards, to wit, on the 30th day of April A. D. 1919, the same being one of the term days of the March Term A. D. 1919 of the Sangamon County Circuit Court, the following order was had and entered of record, to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

46 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. E. S. Smith, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (the same being the Fifth day) of May, in the year of Our Lord One Thousand Nine Hundred Nineteen.

Present:

Hon. E. S. Smith, Judge.
C. F. Mortimer, State's Attorney.
Henry Mester, Sheriff.
Chas. L. Koehn, Clerk.

47 And afterwards, to wit, on the 7th day of July, A. D. 1919, the same being one of the term days of the May Term A. D. 1919, of the Sangamon County Circuit Court, the following order was had and entered of record, to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

48 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. E. S. Smith, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court begun and held at the Court House, in the City of Springfield, County and State aforesaid, on the first Monday (the same being the First day of September, in the year of Our Lord One — Nine Hundred Nineteen.

Present:

Hon. E. S. Smith, Judge.
C. F. Mortimer, State's Attorney.
Henry Mester, Sheriff.
Chas. L. Koehn, Clerk.

49 And afterwards to wit, on the 28th day of October A. D. 1919, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Replication; a copy of said Replication being in the words and figures as follows to wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Sangamon County Circuit Court.

No. 35606.

THE HUMP HAIRPIN MANUFACTURING COMPANY, a Corporation, Complainant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Defendant.

The replication of the Hump Hairpin Manufacturing Company, a corporation, Complainant, to the Answer of Louis L. Emmerson, Secretary of State of the State of Illinois, Defendant.

This replicant saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, says: that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto: and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto by this repli-ant; without this, that any other matter or thing whatsoever in the said answer
50 contained, material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all of

which matters and things this repli-ant is and will be ready to aver and prove, as this Honorable Court shall direct, and prays as in and by its said bill it has already prayed.

ALLEN & CONVERSE,
Solicitors for Complainant.

51 And afterwards to wit, on the 30th day of October A. D. 1919, the same being one of the term days of the September Term A. D. 1919 of the Sangamon County Circuit Court, the following order was had and entered of record, to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally di*d*posed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

52 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. E. S. Smith, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court begun and held at the Court House, in the City of Springfield, County and State aforesaid, on the first Monday (the same being the Third day) of November, in the year of Our Lord One Thousand Nine Hundred and Nineteen.

Present:

Hon. E. S. Smith, Judge.
C. F. Mortimer, State's Attorney.
Henry Mester, Sheriff.
Chas. L. Koehn, Clerk.

53 And afterwards to wit, on the 3rd day of November A. D. 1919, the same being one of the Term days of the November Term A. D. 1919 of the Sangamon County Circuit Court, the following proceedings were had and entered of record, as follows to-wit:

THE HUMP HAIRPIN MANUFACTURING COMPANY, Complainant,

vs.

LOUIS L. EMMERSON, Secretary, etc., Defendant.

Bill of Complaint.

On this day come the parties hereto by their respective solicitors and this cause is now called for hearing.

And it is stipulated and agreed by and between the parties to this cause by their respective solicitors that the evidential facts as set forth in the bill and answer may be taken and considered as the facts in this case for the trial hereof.

And it is further stipulated that the total sales of the complainant for the year 1917 and the total receipts from said sales both to residents and non-residents of the State of Illinois were $260,334.98, and that the total sales and receipts therefrom during the said year to residents of Illinois were $25,814.00.

54 And the Court having heard the evidence submitted and the arguments of counsel and this cause being now concluded the Court takes this cause under advisement.

55 And afterwards to wit, on the 2nd day of January A. D. 1920, the same being one of the Term days of the November Term A. D. 1919, of the Sangamon County Circuit Court, the following order was had and entered of record as follows to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

* * * * * * *

"It is ordered that Court adjourn until Court in Course."

56 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. E. S. Smith, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court begun and held at the Court House, in the City of Springfield, County and State aforesaid, on the first Monday (the same being the Fifth day) of January, in the year of Our Lord One Thousand Nine Hundred and Twenty.

Present:

Hon. E. S. Smith, Judge.
C. F. Mortimer, State's Attorney.
Henry Mester, Sheriff.
Chas. L. Koehn, Clerk.

57 And afterwards to wit, on the 29th day of January, A. D. 1920, the same being one of the Term days of the January Term A. D. 1920 of the Sangamon County Circuit Court, the following Proceedings were had and entered of record, to wit:

THE HUMP HAIRPIN MANUFACTURING COMPANY, Complainant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Defendant.

Bill of Complaint.

This day come the parties in the above entitled cause by their respective solicitors, and this cause having been heretofore heard upon the Bill of Complaint and the answer of the defendant and submitted to the Court for advisement, and the Court being now on this day fully advised in the premises:

It is ordered by the Court that the Bill of Complaint be, and the same is hereby dismissed for want of equity.

And it is therefore considered and adjudged by the Court that the said complainant pay the costs of this case, and that said defendant have and recover of and from the said complainant his costs by him herein expended and that execution may issue therefor.

58 And afterwards to-wit, on the 7th day of February, A. D. 1920, the same being one of the term days of the January Term, A. D. 1920 of the Sangamon County Circuit Court, the following decree was filed, approved, made and entered of record to-wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court of Sangamon County.

No. 35606.

In Chancery.

THE HUMP HAIRPIN MANUFACTURING COMPANY

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Decree.

This cause having come on to be heard upon the Bill of Complaint herein, the answer of the defendant thereto, and the stipulation of facts filed herein by the parties hereto, and having been argued by counsel for the respective parties:

Now, therefore, on consideration thereof,

It is ordered, adjudged and decreed and the Court doth hereby order, adjudge and decree that the bill herein be and the same hereby is dismissed for want of equity.

59 It is further ordered that the writ of injunction heretofore ordered and issued herein be and the same is set aside and dissolved.

To which decree and order of the Court the complainant excepts and prays an appeal to the Supreme Court which is allowed on filing bond in the sum of Sixty-five Hundred Dollars ($6,500), to be approved by the Clerk of this Court, within thirty days from this date. Certificate of Evidence to be filed within fifty days.

Dated this 7th day of February, A. D. 1920.

Enter:

E. S. SMITH,
Judge.

60 And afterwards to wit on the 17th day of February, A. D. 1920, there was filed and approved in the office of the Clerk of the Sangamon County Circuit Court a certain Appeal Bond to the Supreme Court of Illinois: a copy of said Appeal Bond being in the words and figures as follows to wit:

Know all men by these presents:

That we, The Hump Hairpin Manufacturing Company as Principal, and National Surety Company, a corporation, as Surety, are held and firmly bound unto Louis L. Emmerson, as Secretary of State of the State of Illinois, in the penal sum of Six Thousand Five Hundred Dollars, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated at Chicago this 14th day of February, in the year of Our Lord One Thousand Nine Hundred and Twenty.

The condition of the above obligation is such, That whereas the said Louis L. Emmerson, as Secretary of State of the State of Illinois, did, at the January Term, A. D. 1920, of the Circuit Court of Sangamon County, State of Illinois, holden within and for said County, obtain a decree against the above bounden, Hump Hairpin Manufacturing Company, dismissing its bill of complaint for want of equity and dissolving the temporary injunction theretofore granted said complainant, and for costs of suit in a

61 certain cause pending in said Court wherein said Hump Hairpin Manufacturing Company was Complainant, and said Secretary of State was defendant, from which decree the said Hump Hairpin Manufacturing Company, complainant, has prayed for and obtained an appeal to the Supreme Court of said State of Illinois.

Now, if the said Hump Hairpin Manufacturing Company shall duly prosecute said appeal, and shall, moreover pay to the said

Secretary of State of the State of Illinois the sum of Five Thousand Nine Hundred and Seventy-five Dollars ($5,975.00) together with costs of suit, in case the said decree shall be affirmed in the said Supreme Court, and shall if said decree is reversed, pay to said Secretary of State the sum of Two Thousand Nine Hundred Ninety seven and 25/100ths ($2,997.25) Dollars, or whatever other amount may be found to be due, then the above obligation to be null and void; otherwise to remain in full force and virtue.

[SEAL.] THE HUMP HAIRPIN MFG. COMPANY,
By SCOTT GOLDBERG, [SEAL.]
President.
NATIONAL SURETY COMPANY,
W. HERBERT STEWART. [SEAL.]
Attorney in Fact.
W. HERBERT STEWART. [SEAL.]

Witness:

FRED O. CATON,
Secretary.
[Corporate Seal.]

Taken and approved this 17th day of February, 1920.
CHAS. L. KOEHN,
Clerk.

62 STATE OF ILLINOIS,
County of Cook ss.

I, Albert L. Starrs, a Notary Public of Cook County, in the State of Illinois, do hereby certify that W. Herbert Stewart Attorney in fact, of National Surety Company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument, for and on behalf of National Surety Company for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the City of Chicago, in said County, this 14th day of October, A. D. 1920.

[Notarial Seal.] ALBERT L. STARRS,
Notary Public.

63 And afterwards to wit on the 17th day of February A. D. 1920, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Praecipe and Notice for Record; a copy of said Praecipe and Notice together with acknowledgment of service of Notice thereon being in the words and figures as follows to wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, January Term, 1920.

HUMP HAIRPIN MANUFACTURING COMPANY

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Appeal to the Supreme Court of the State of Illinois.

Praecipe for Record.

To Charles L. Koehn, Clerk of said Circuit Court:

You will please prepare a complete transcript of the record in the above entitled cause, incorporating therein:

(1) The process, service and return.

(2) Original Bill, amendment thereto, answer of the Defendant, and Replication of Complainant.

64 (3) The Decree of the Court.

(4) All orders in the cause.

(5) Certificate of evidence and stipulation of Counsel for the parties.

(6) Appeal Bond.

(7) Exception of Complainant to decree.

(8) Prayer for appeal, and order allowing the same.

(9) Praecipe for record, notice thereof, and acknowledgment of receipt by solicitor for Appellee.

ALLEN & CONVERSE,
Solicitors for Appellant.

65 STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, January Term, 1920.

HUMP HAIRPIN MANUFACTURING COMPANY
vs.
LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Appeal to the Supreme Court of the State of Illinois.

To Edward J. Brundage, Attorney General of the State of Illinois, Attorney for Defendant:

You will please take notice, that on the 17th day of February A. D. 1920, the undersigned, as solicitors for Appellant, will present and file in the office of Charles L. Koehn, Clerk of the Circuit Court of Sangamon County, a præcipe for a complete record, a true copy of said Præcipe being hereto attached.

Dated at Springfield, Illinois, this 11th day of February A. D. 1920.

ALLEN & CONVERSE,
Solicitors for Appellant.

Received a true copy of the foreging Notice and Præcipe thereto attached, this 11th day of February, 1920.

EDWARD J. BRUNDAGE,
Attorney General,
Solicitor for Appellee.

66 And afterwards to-wit on the 24th day of February A. D. 1920, there was filed in the office of the Clerk of the Sangamon County Circuit Court, a certain Certificate of Evidence; a copy of said Certificate of Evidence being in the words and figures as follows to-wit:

67 STATE OF ILLINOIS,
Sangamon County, ss:

In the Circuit Court.

THE HUMP HAIRPIN MANUFACTURING COMPANY
vs.
LOUIS L. EMMERSON, Secretary of State of the State of Illinois.

Bill for Injunction.

Certificate of Evidence.

Be it remembered, that upon the hearing of the above entitled cause before the said Court, on the 3rd day of November A. D. 1919, a certain Stipulation of Facts was made and entered into between

the parties hereto and introduced and filed; which said Stipulation of Facts is in the words and figures as follows and was all the evidence introduced on the trial of said cause:

It is stipulated and agreed by the parties to this cause by their respective attorneys that the evidential facts in the bill and answer may be taken and considered as the facts in this case for the trial hereof.

It is further stipulated, that the total sales of the complainant for the year 1917 and the total receipts from said sales, both to residents and non-residents of Illinois was $260,334.98, and that the total sales and receipts therefrom during said year to residents of Illinois was $25,814.00.

68 And this cause having been submitted to the Court for advisement, and the Court being fully advised in the premises, dismisses the bill for want of equity.

Whereupon the said complainant by its solicitors prayed an appeal of said cause to the Supreme Court of the State of Illinois, which is allowed by the Court upon the said complainant filing bond in the penal sum of Sixty-five Hundred Dollars ($6,500.00), to be approved by the Clerk of this Court in fifty *days* (50) days. Certificate of Evidence in fifty (50) days.

And for as much as the matters and things above set forth do not fully appear of record, the complainant tenders this, its Certificate of Evidence, and prays that the same may be signed and sealed by the Judge of this Honorable Court trying said cause, pursuant to the Statute in such case made and provided, which is done accordingly this 24 day of February A. D. 1920.

E. S. SMITH, [SEAL.]
Judge of the Circuit Court.

69 STATE OF ILLINOIS,
Sangamon County, ss:

I, Chas. L. Koehn, Clerk of the Circuit Court within and for the County of Sangamon in the State of Illinois, and the keeper of the records and seal of said Court, do hereby certify that the foregoing is a true, perfect and complete Transcript of the Record and proceedings now remaining in my office, copy of appeal bond and a copy of the Certificate of Evidence filed, in a certain cause then pending in said court on the Chancery side thereof, wherein The Hump Hairpin Manufacturing Company is Complainant and Louis L. Emmerson, Secretary of State of the State of Illinois is Defendant as the same appears from the records and files of said court in my office remaining.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Springfield, this 25th day of February A. D. 1920.

[SEAL.] CHAS. L. KOEHN,
Clerk.

70 In the Supreme Court of the State of Illinois.

HUMP HAIRPIN MANUFACTURING COMPANY, Appellant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Appellee.

Appeal from the Circuit Court of Sangamon County.

Assignment of Errors.

(1) The Court erred in entering a decree dismissing the bill of complaint for want of equity.

(2) The Court erred in ordering that the temporary injunction granted in said cause be dissolved.

(3) The Court erred in not granting to complainant a decree for permanent injunction upon payment by complainant of the sum of $3,272.00.

(4) The Court erred in finding that there was due from Complainant to the Defendant the sum of $5,975.00.

(5) The Court erred in not finding that there was due from the Complainant to the Defendant the sum of $3,272.00 and no more.

ALLEN & CONVERSE,
Solicitors for Appellant.

71 And afterwards, to wit, on the 20th day of April, A. D. 1920, the same being one of the days of the said April term of Court, the following proceedings were had and entered of record in the words and figures following, to wit:

72 No. 13315.

HUMP HAIRPIN MANUFACTURING COMPANY, Appellant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Appellee.

Appeal Circuit Court Sangamon County.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of

counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by C. N. Boord, Assistant Attorney General, for appellee, is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

73 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a term of the Supreme Court, begun and held at Springfield on Tuesday, the First day of June, in the year of our Lord One Thousand Nine Hundred and Twenty, within and for the State of Illinois.

Present: Chief Justice James H. Cartwright, Justice William M. Farmer, Justice Orrin N. Carter, Justice Frank K. Dunn, Justice Warren W. Duncan, Justice Clyde E. Stone, Justice Floyd E. Thompson; Edward J. Brundage, Attorney General; Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered, that afterward, to-wit: on the 16th day of June, 1920, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 13315.

HUMP HAIRPIN MANUFACTURING CO., Appellant,

v.

LOUIS L. EMMERSON, Secretary of State of Illinois, Appellee.

Error to ——.

Appeal from Circuit Court Sangamon.

74 April Term, A. D. 1920.

Agenda 61.

#13315.

HUMP HAIRPIN MANUFACTURING COMPANY, Appellant,

v.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Appellee.

Appeal from the Circuit Court of Sangamon County.

STONE, J.:

Appellant, a foreign corporation, filed a bill in the Circuit Court of Sangamon County to restrain the Secretary of State of Illinois from revoking its license to do business in this State. The chancellor heard the cause on the bill, answer, replication and stipulation of facts and entered a decree dismissing the bill for want of equity.

Appellant was organized in 1914 under the laws of West Virginia with an authorized capital stock of six million dollars of which amount five million five hundred thousand dollars had been issued at the time interrogatories were propounded to it by the appellee, Secretary of State under sec. 5 B of the foreign corporation act. It was licensed by the Secretary of State to do business in this State on November 17th, 1914, and at that time paid a license fee of seventy dollars; and has since transacted business in the State of Illinois. It manufactures its products in the City of Chicago, where it employs a large number of employees and in addition thereto maintains a force
75 of travelling salesmen who travel in the various states soliciting orders from wholesalers and jobbers. These orders are mailed to appellant at its offices in Chicago and upon acceptance, its products are shipped by express, freight or mail from Chicago to the purchasers in the states from which the orders are received.

In answer to interrogatories submitted by the Secretary of State appellant stated that its total annual business for the year 1917 was $260,334.96; all of which was transacted through its office in Chicago; that the amount of sales made to residents of Illinois in said year was $25,814.00. It is stipulated that up to the time of filing the bill of complaint, the appellant did not have or maintain any other factory or manufacturing establishment or maintain any other office or place for the transaction of said business and that all orders for its products were received, accepted at and filled from its office, factory and store-room in the City of Chicago.

It is contended by the appellant that in determining the amount of license fee to be paid by it, under the foreign corporation act, all or one hundred per cent of its tangible property—all being located

in Illinois—should be averaged with 9.9% of its total business, for the reason that only that part of its total business is transacted in this State, thereby making the fee payable on 54.95 per cent of the capital stock represented in Illinois or $3,297,000.00 of capital stock and amounting to a fee of $3,342.00 less the credit of $70 previously paid. It is also urged that a fee based on a greater amount of capital stock would burden Interstate Commerce which a state has no power to do.

76 It is contended by the appellee that the total business transacted by the appellant is transacted in Illinois within the terms of the act in question and that as all its tangible property is located in this state, it should pay a fee on its authorized capital stock of $6,000,000 or $6,045.00 less $70 previously paid in 1914 leaving a balance due of $5,975.00.

This case arises under the same section of the Foreign Corporation Act as was under consideration in American Can Co. v. Emmerson, 288 Ill. 289 and as to all questions arising here which were there treated, that case is controlling and those questions need not be further discussed. The distinction between that case and the instant case is that the license fee in the former case was fixed on a basis of less than the entire capital stock, it being there shown that the appellant was engaged in the transaction of business in other states aside from Illinois, while in the instant case, the fee required by appellee is computed on the entire capital stock of the appellant on the ground that all its tangible property is located and all of its capital stock is represented by its business transacted in this state.

Section 5 B of the Foreign Corporation Act under which corporation fees are assessed is as follows: "It shall be the duty of the Secretary of State to propound interrogatories from time to time to officers of such foreign corporations doing business in this State to ascertain the proportion of capital stock actually being represented by property located and business transacted in the State of Illi-

77 nois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this State. If no tangible property is used in the business of the corporation, the proportion of capital stock represented shall be determined with reference only to the percentage of the total business of the corporation transacted in Illinois. In the event that the foreign corporation making application for license has capital stock of no par value, its shares for the purpose of fixing the license fee shall be considered to be of the par value of one hundred dollars ($100) per share." (Hurd's Stat. 1917, p. 719.)

In American Can Co. v. Emmerson, supra, it was held that while the State has no right to burden interstate commerce by taxing it, yet the State is authorized to levy a license fee within its authority measured by the capital stock, though a part of such capital stock may be represented in the conduct of Interstate Commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed, to burden commerce of that character. That

is likewise the rule adopted by the United States Supreme Court in Kansas City v. Stiles, 242 U. S. 111; Northwestern Mutual Ins. Co. v. Wisconsin, 247 U. S. 132; and United States Glue Co. v. Oak Creek, 247 U. S. 321.

The question arising here is whether or not all of the capital stock of appellant is represented by property located in this state and by business transacted in this State. If the property located
78 and the business transacted in Illinois represent its entire capital stock, then appellant is required to pay a fee computed on its entire capital stock. If on the other hand, when the percentage of the total business of the corporation transacted in Illinois is averaged with the total tangible property located in this state it is found that not all of the capital stock is being so represented then only that portion which is so represented can be taken as a measure of the fee to be assessed in this case.

It being admitted that the entire tangible property of the appellant is within the state, we come to a consideration therefore of the question whether or not all the capital stock of the corporation is represented by business transacted within this state within the meaning of this act. It is admitted that all of appellant's commodities are manufactured within Illinois and that its sole business is the manufacture and sale of said commodities. It is also admitted that its only place of business is within this state and that it maintains no office or place of business in any other state. It is also admitted that the sales of these commodities are conducted by travelling salesmen who take the orders of customers and send such orders to the office of appellant within this state for acceptance; that they are there accepted and the goods shipped from the office and factory in Illinois.

Under the general rule that a sale is made where the order is accepted and the goods shipped, it becomes evident that all of the sales of goods of appellant are made in Chicago. These sales are business transacted within this state and though some of these transactions also take on an Interstate character, yet all contain
79 the element of sale which takes place within this state, and represent business done within this State. The manufacture of appellant's products in this State, the accepting of the orders and the completion of the contracts for sale in this state constitute the transaction of business in Illinois within the meaning of the Foreign Corporation Act. This being true, the whole of the capital stock is represented by property located and business transacted in this state.

But, it is urged, a larger portion of the business of appellant is Interstate Commerce and that therefore to require this fee for the privilege of doing business in this State would be to burden Interstate Commerce, and appellant contends that the American Can Co. case is not decisive of the question here for the reason that in that case the fee was not based upon the entire capital stock and that this case in that regard should be distinguished from that case. We do not think so. The principle to be applied is entirely the same. The rule laid down in the American Can Co. case applying to a computation based on a portion of the capital stock may, by the same principle, apply to a computation based on the entire capital stock where

the entire capital stock of the foreign corporation is represented by business transacted within this State. As was said in that case, the distinction between taxes which are and which are not a burden upon Interstate Commerce, lies in the purpose or necessary effect of such tax. In Maine v. Grand Trunk Railway Co. 142 U. S. 217, the court sustained a tax which required every railroad operated
80 within the State of Maine to pay an annual tax for the privilege of exercising its franchise therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the State, such gross receipts being derived from its entire business, State and inter-State. The resort to the gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation and thus measuring the tax, which was held to be within the power of the State. Such is likewise the holding in U. S. Express Co. v. Minnesota, 223 U. S. 335. Appellant cites in support of its contention the case of Crew Levick Co. v. Penn, 245 U. S. 292, but as the opinion in that case says: "so obvious is the distinction between these taxes and those that were sustained in Maine v. Grand Trunk Railway Co., 142 U. S. 217; U. S. Express Co. v. Minnesota, 223 U. S. 335, * * * and some other cases of the same class, that no time need to be spent upon it."

We are of the opinion that, applying the rule laid down in the American Can Co. case, the contention of the appellee must be sustained. So far as the representation of the capital of the aappellant is concerned, all of it is represented by business done within the State of Illinois. All of its capital stock is represented in Illinois. Appellant is not doing business in any other state so as to make it amenable to a foreign corporation act of such state. International Text Book Co. v. Pigg, 217 U. S. 91. To permit appellant to avoid this license fee would not be according the same treatment to foreign and
81 domestic corporations, as required by the Foreign Corporation Act; but would be an unjust discrimination against a Domestic Corporation which pays the fee on all of its capital stock, even though it sends its manufactured goods out of the state in the same manner as does appellant, and in favor of the appellant corporation by permitting it to pay a much smaller fee because it sends out of the state the larger per cent of its goods manufactured and sold in this state. In other words, under such a holding, of two corporations, one domestic and the other foreign, with the same capital stock, doing the same amount of business each year, manufacturing all of their goods in this state, with all sales transactions taking place in this state, neither maintaining an office or place of business outside this state but each sending 90% of their goods out of the state, the domestic corporation would be required to pay a fee based upon its entire capital stock, while in computing the fee of the foreign corporation but 10% of its entire capital stock would be used as a basis. Such a holding is repulsive to the ordinary sense of fairness as well as contrary to the spirit of the act.

We are of the opinion the chancellor did not err in dismissing appellant's bill for want of equity. The decree is therefore affirmed.

Decree Affirmed.

82 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a term of the Supreme Court, begun and held at Springfield on Tuesday, the first day of June, in the year of our Lord One Thousand Nine Hundred and Twenty, within and for the State of Illinois.

Present: Chief Justice James H. Cartwright; Justice William M. Farmer, Justice Orrin N. Carter, Justice Frank K. Dunn, Justice Warren W. Duncan, Justice Clyde E. Stone, Justice Floyd E. Thompson; Edward J. Brundage, Attorney General; Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL,
Clerk.

Be it remembered, that, to-wit: on the 16th day of June, A. D. 1920, the same being one of the days of the said June term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 13315.

HUMP HAIRPIN MANUFACTURING COMPANY, Appellant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Appellee.

Appeal from Circuit Court, Sangamon.

Error to —.

June 16th, A. D. 1920.

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Decree of the Circuit Court aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs, by him in this behalf expended, to be taxed, and that he have execution therefor.

83 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, Charles W. Vail, Clerk of said Court, do hereby certify that the foregoing is a full, true, and complete transcript of the record in the case of:

HUMP HAIRPIN MANUFACTURING COMPANY, Appellant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Appellee,

and also of the Opinion of the Court rendered therein, as the same now appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 4th day of September, A. D. 1920.

[Seal of the Supreme Court, States of Illinois.]

CHARLES W. VAIL,
Clerk Supreme Court of Illinois.

83½ Be it remembered, to-wit, that on the 31st day of August, A. D. 1920, there was duly filed by Hump Hairpin Manufacturing Company, plaintiff in error, in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error, with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. James H. Cartwright, Chief Justice of the Supreme Court of Illinois, together with the original order by the said Chief Justice allowing said writ of error, which original order is attached and incorporated herein and which documents are in words and figures as follows, to-wit:

84 Filed Aug. 31 '20. Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA,
State of Illinois:

To the Honorable James H. Cartwright, Chief Justice of the Supreme Court of the State of Illinois:

The Petition of the Hump Hairpin Manufacturing Company respectfully shows that on the 16th day of June, A. D. 1920, the Supreme Court of the State of Illinois rendered a final judgment against your petitioner in a certain cause wherein the Hump Hairpin Manufacturing Company was complainant and Louis L. Emmerson, Secretary of State, of the State of Illinois, was defendant, affirming a de-

cree of the Circuit Court of Sangamon County, dismissing for want of equity the bill for injunction exhibited therein by your petitioner, as will appear by reference to the record and proceedings in said cause.

Your petitioner further shows that the Supreme Court of Illinois, wherein the said decree was affirmed as aforesaid, is the highest court of said State in which a decision in said suit could be had.

Your petition claims the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 237 of the Judiciary Act of the United States, because there is drawn in question the validity of a statute of, or an authority exercised under, the State of Illinois, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision is in favor of the validity of said state statute, as appears by the record of the proceedings in said cause, which is herewith submitted.

85 Wherefore, your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation, and an order fixing the amount of a supersedeas bond.

(Assignment of Errors herewith.)

WALTER McC. ALLEN,
HENRY A. CONVERSE,
COLIN C. H. FYFFE,
Attorneys for Petitioner.

85½ No. 13315. In the Supreme Court of Illinois. Hump Hairpin Manufacturing Company vs. Louis L. Emmerson, Secretary of State. Petition for Writ of Error.

86 UNITED STATES OF AMERICA,
Supreme Court of the United States, ss:

In the Supreme Court of the United States of America.

THE HUMP HAIRPIN MANUFACTURING COMPANY, Plaintiff in Error,

vs.

LOUIS L. EMERSON, Secretary of State, of the State of Illinois, Defendant in Error.

Order.

The above entitled matter coming on to be heard upon the petition for writ of error and the assignment of errors of Hump Hairpin Manufacturing Company, a corporation, and upon examination of said petition and assignment of errors and of the record of said cause, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said cause,

It is ordered, That a writ of error be and is hereby allowed from the Supreme Court of the United States to the Supreme Court of the State of Illinois as prayed for in said petition and that the said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law; and that the bond presented by the petitioner be and the same is hereby approved.

Enter:

JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of Illinois.

August 23, 1920.

Filed Aug. 31, '20.
CHAS. W. VAIL,
Clerk Supreme Court.

86½ No. 13315. In the Supreme Court of Illinois. Hump Hairpin Manufacturing Company, vs. Louis L. Emerson, Secretary of State. Order.

87 UNITED STATES OF AMERICA,
Supreme Court of the United States, ss:

In the Supreme Court of the United States of America.

THE HUMP HAIRPIN MANUFACTURING COMPANY, Plaintiff in Error,

vs.

LOUIS L. EMERSON, Secretary of State, of the State of Illinois, Defendant in Error.

Assignment of Errors.

Filed Aug. 31, '20. Chas. W. Vail, Clerk Supreme Court.

Now comes Hump Hairpin Manufacturing Company, a corporation, Plaintiff in Error, in connection with its petition for Writ of Error herein, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of Illinois in the above entitled cause, there is manifest error in this:

1. The Supreme Court of Illinois erred in affirming the decree of the Circuit Court of Sangamon County dismissing Plaintiff in Error's bill for want of equity.

2. The Supreme Court of Illinois erred in failing and refusing to reverse the decree of the Circuit Court of Sangamon County dismissing Plaintiff in Error's bill for want of equity.

3. The Supreme Court of Illinois erred in holding that the entire capital stock of Plaintiff in Error is represented by property located

and business transacted in the State of Illinois, although ninety (90) per cent of its goods are sold outside the State of Illinois.

4. The Supreme Court of Illinois erred in holding that Section 5*b* of an Act entitled, "An Act to regulate the admission of
88 foreign corporations for profit to do business in the State of Illinois," approved May 18, 1905, in force July 1, 1905, as subsequently amended by an Act approved June 22, 1917, in force July 1, 1917, as construed by the Circuit Court of Sangamon County of the State of Illinois, is a valid Act, and is not in conflict with or repugnant to the Fourteenth Amendment to the Constitution of the United States, and does not deprive Plaintiff in Error of its property without due process of law, and does not deny to Plaintiff in Error the equal protection of the laws.

5. The interpretation placed by the Supreme Court of Illinois in its said decision and judgment upon Section 5*b* of the Foreign Corporation Act of Illinois is erroneous, in that said statute as construed deprives Plaintiff in Error of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, and burdens interstate commerce contrary to Article 1 Section 8, Paragraph 3 of the Constitution of the United States.

Wherefore, Plaintiff in Error prays that the said decision and judgment of the Supreme Court of Illinois may be reversed, annulled and altogether held for naught.

WALTER McC. ALLEN,
HENRY A. CONVERSE,
COLIN C. H. FYFFE,
Attorneys for Plaintiff in Error.

88½ [Endorsed:] No. 13315. In the Supreme Court of Illinois. Hump Hairpin Manufacturing Company, vs. Louis L. Emerson, Secretary of State. Assignment of Errors.

89 Be it remembered, that on the 31st day of August, A. D. 1920, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Hump Hairpin Manufacturing Company, plaintiff in error, an original Bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, a copy of which said Bond is in the words and figures following, to-wit:

Filed Aug. 31, '20. Chas. W. Vail, Clerk Supreme Court.

Know all men by these presents, That we, Hump Hairpin Manufacturing Company, a corporation, Plaintiff in Error, as Principal, and the United States Fidelity & Guaranty Company, a corporation, as Surety, are held and firmly bound unto Louis L. Emerson, Secretary of State, of the State of Illinois, in the sum of One Thousand ($1000.00) Dollars, to be paid to the said Louis L. Emerson,

Secretary of State of the State of Illinois, his heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves and our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 20th day of August, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Whereas, lately in a suit pending in the Supreme Court of Illinois between Hump Hairpin Manufacturing Company, as Plaintiff in Error, and Louis L. Emerson, Secretary of State, of the State of Illinois, as Defendant in Error, a judgment was rendered against the said Plaintiff in Error affirming the decree of the Circuit Court of Sangamon County, Illinois, dismissing for want of equity the bill for injunction exhibited therein by Plaintiff in Error; and the above named Plaintiff in Error having prosecuted a writ of error from the Supreme Court of the United States to the Supreme Court of Illinois to reverse the judgment of the Supreme Court of Illinois in said cause, and a citation having been directed to the above named Defendant in Error, citing and admonishing him to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date thereof.

Now, therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute its said writ
90 of error to effect, and answer all damages and costs, if it fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

HUMP HAIRPIN MANUFACTURING COMPANY,
By SOL H. GOLDBERG,
President.
[SEAL.] FRED A. CATON,
Secretary.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By JOHN V. CLINNIN, AND
ALPHONSUS D. SMITH,
Attorneys in Fact.

Approved by:
JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of Illinois.

August 23, 1920.

STATE OF ILLINOIS,
County of Cook, ss:

I, Joseph R. McDonald, a Notary Public in and for the County and State aforesaid, do hereby certify that John V. Clinnin and Alphonsus D. Smith, Attorneys-in-fact of the United States Fidelity and Guaranty Company, who are personally known to me to be the

same persons whose names are subscribed in the foregoing instrument, as such Attorneys-in-fact, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, and as the free and voluntary act of the said United States Fidelity and Guaranty Company for the uses and purposes therein set forth, and caused the corporate seal of said Company to be thereto attached.

Given under my hand and Notarial seal this 20th day of August, A. D. 1920.

(Signed) JOSEPH R. McDONALD,
Notary Public.

My commission will expire November 27, 1920.

91 Be it remembered, that on the 31st day of August, A. D. 1920, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original Writ of Error, which is hereby attached and is in words and figures as follows, to-wit:

92 Filed Aug. 31, '20. Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest Court of law of the said State in which a decision could be had in the said suit between Hump Hairpin Manufacturing Company and Louis L. Emmerson, Secretary of State, of the State of Illinois, where was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such validity, and a manifest error hath appeared to the great damage of said Hump Hairpin Manufacturing Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 25th day of Au-
93 gust, in the year of our Lord one thousand nine hundred and twenty.

[Seal of Dist. Court of the U. S., Northern Dist., Illinois.]

JOHN H. R. JAMAR,
Clerk of the District Court of the United States for the Northern District of Illinois.

Allowed:
JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of Illinois.

August 23, 1920.

93½ [Endorsed:] No. 13315. In the Supreme Court of Illinois. Hump Hairpin Manufacturing Company, vs. Louis L. Emmerson, Secretary of State. Writ.

94 SUPREME COURT,
State of Illinois, ss:

I, Charles W. Vail, Clerk of the Supreme Court of Illinois, do hereby certify that there was lodged with me as such Clerk on the 31st day of August, A. D. 1920, in the matter of No. 13315, Hump Hairpin Manufacturing Company, plaintiff in error, vs. Louis L. Emmerson, Secretary of State, defendant in error, the following documents:

1. The original bond approved by James H. Cartwright, Chief Justice of the Supreme Court of Illinois, on the 23rd day of August, 1920, given as security for the prosecution of the writ of error in the United States Supreme Court.

2. The original writ of error issued by John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, on the 25th day of August, 1920, together with two copies, one for the defendant in error and one for the files of my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the Supreme Court of Illinois at my office, in the City of Springfield, State of Illinois, this 31st day of August, A. D. 1920.

[Seal of the Supreme Court, State of Illinois.]

CHAS. W. VAIL [SEAL.]
Clerk of the Supreme Court.

Filed Aug. 31, '20. Chas. W. Vail, Clerk Supreme Court.

94½ [Endorsed:] No. 13315. In the Supreme Court of Illinois. Hump Hairpin Manufacturing Company, appellant, vs. Louis L. Emmerson, Secretary of State of the State of Illinois, appellee. Certificate of Lodgment.

95 And afterwards, to-wit, on the 31st day of August, A. D. 1920, a certain Citation showing service on Edward J. Brundage, Attorney General, representing Louis L. Emmerson, Secretary of State of the State of Illinois, was filed in the office of the Clerk of the Supreme Court, in the words and figures following, to-wit:

96 Filed Aug. 31, '20. Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Louis L. Emmerson, Secretary of State, of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Illinois wherein Hump Hairpin Manufacturing Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Justice of the Supreme Court of Illinois, this 23rd day of August, in the Year of our Lord One Thousand Nine Hundred and Twenty.

JAMES H. CARTWRIGHT. [SEAL.]
Chief Justice of the
Supreme Court of Illinois.

I, attorney of record for Louis L. Emerson, Secretary of State, appellee, in the case of Hump Hairpin Manufacturing Company, appellant, vs. Louis L. Emmerson, Secretary of State, of the State of Illinois, appellee, No. 13315, hereby acknowledge due service of the above citation this 31st day of August, A. D. 1920.

EDWARD J. BRUNDAGE,
Attorney General,
Attorney for Appellee.

96½ [Endorsed:] No. 13315. In the Supreme Court of Illinois. Hump Hairpin Manufacturing Company vs. Louis L. Emmerson, Secretary of State. Citation.

97 Be it also remembered that on the 31st day of August, A. D. 1920, a certain Præcipe for record to be transmitted to the Supreme Court of the United States, together with notice on Edward J. Brundage, Attorney General, attorney for appellee, that said

Præcipe for writ of error had been filed with the Clerk of the Supreme Court, with proof of service of said Præcipe on said Attorney General, were filed in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

98 No. 13315.

In the Supreme Court of Illinois.

HUMP HAIRPIN MANUFACTURING COMPANY, Appellant,

vs.

LOUIS L. EMMERSON, Secretary of State, of the State of Illinois, Appellee.

Præcipe for Record.

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the Supreme Court of the United States on writ of error sued out in said cause, by including therein the transcript of record filed in this Court from the Circuit Court of Sangamon County, together with a transcript of the proceedings in this Court. Dated, this 31st day of August, A. D. 1920.

WALTER McC. ALLEN,
HENRY A. CONVERSE,
COLIN C. H. FYFFE,
Attorneys for Appellant.

Filed Aug. 31 '20. Chas. W. Vail, Clerk Supreme Court.

98½ [Endorsed:] No. 13315. In the Supreme Court of Illinois. Hump Hairpin Manufacturing Company, Appellant, vs. Louis L. Emmerson, Secretary of State of the State of Illinois, Appellee. Præcipe for Record.

Filed Aug. 31, '20. Chas. W. Vail, Clerk Supreme Court.

99 No. 13315.

In the Supreme Court of Illinois.

HUMP HAIRPIN MANUFACTURING COMPANY, Appellant,

vs.

LOUIS L. EMMERSON, Secretary of State, of the State of Illinois, Appellee.

Notice.

To Edward J. Brundage, Attorney General,
Attorney for Appellee.

Please take notice, that on the 31st day of August, A. D. 1920, the undersigned filed with the Clerk of this Court a Præcipe for the

record to be transmitted to the Supreme Court of the United States on writ of error sued out in the above entitled cause, a copy of which Precipe is herewith served on you.

Dated, this 31st day of August, A. D. 1920.

WALTER McC. ALLEN,
HENRY A. CONVERSE,
COLIN C. H. FYFFE,
Attorneys for Appellant.

Service of the within Notice and copy of Precipe is hereby accepted, this 31st day of August, A. D. 1920.

EDWARD J. BRUNDAGE,
Attorney for Appellee.

99½ [Endorsed:] No. 13315. In the Supreme Court of Illinois. Hump Hairpin Manufacturing Company, Appellant, vs. Louis L. Emmerson, Secretary of State of the State of Illinois, Appellee. Notice.

100 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within Writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Illinois, in the City of Springfield, this 4th day of September, A. D. 1920.

[Seal of the Supreme Court, State of Illinois.]

CHARLES W. VAH,
Clerk Supreme Court of Illinois.

Endorsed on cover: File No. 27,902. Illinois Supreme Court, Term No. 545. Hump Hairpin Manufacturing Company, plaintiff in error, vs. Louis L. Emmerson, Secretary of State of the State of Illinois. Filed September 15th, 1920. File No. 27,902.

Office Supreme Court, U. S.
FILED
JAN 10 1922
WM. R. STANSBURY

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 545 139

HUMP HAIRPIN MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

COLIN C. H. FYFFE,
Counsel for Plaintiff in Error.

(27902)

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1920.

No. 545.

HUMP HAIRPIN MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error, the Hump Hairpin Manufacturing Company, is a corporation organized under the laws of West Virginia in 1914, and has an authorized capital stock of $6,000,000. This company was licensed to do business in the State of Illinois in 1914, paying at that time a license fee of Seventy Dollars ($70) in compliance with the then-existing laws of the state of Illinois. Since obtaining this license the company has transacted business in the State of Illinois. It manufactures its products in the City of Chicago, and maintains a force of traveling salesmen who solicit orders in the several states from wholesalers and jobbers. These orders are mailed

to plaintiff in error at its Chicago office, and the products of the company are shipped by express, freight or mail from Chicago to purchasers from whom orders are received.

By act of 1917 (Illinois Laws, 1917, p. 306), the Illinois General Assembly amended the foreign corporation act. The text of this legislation, so far as material, is quoted below:

> 5a. * * * every foreign corporation other than insurance companies, building and loan companies, and surety companies, heretofore or hereafter admitted to do business in this State under any foreign corporations statutes that increases or which has increased the proportion or amount of its capital stock represented in the State of Illinois, shall file a statement showing such increase with the Secretary of State and pay the same fees as are paid by domestic corporations upon increases in capital stock.
>
> 5b. It shall be the duty of the Secretary of State to propound interrogatories from time to time to officers of such foreign corporations doing business in this State to ascertain the proportion of capital stock actually being represented by property located and business transacted in the State of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this State. If no tangible property is used in the business of the corporation, the proportion of capital stock represented shall be determined with reference only to the percentage of the total business of the corporation transacted in Illinois. In the event that the foreign corporation making application for license has capital stock of no par value, its shares for the purpose of fixing the license fee shall be considered to be of the par value of one hundred dollars ($100) per share."

Acting under the terms of this law, the Secretary of State of Illinois propounded interrogatories to the Hump

Hairpin Manufacturing Company, answers to which were filed in September, 1918. Answers to these interrogatories showed that all of the tangible property of the company was located in Illinois, and that for the last preceding fiscal year of the company (1917) its sales were $260,336.96, of which $25,814 were made to residents of Illinois. (Rec. 18, 19.)

Upon the basis of these answers, the Secretary of State of Illinois determined that all of the company's property was located in Illinois, and all of its business transacted in Illinois; and that therefore the license fee under the act of 1917 should be based upon the whole amount of the company's authorized capital stock of $6,000,000. He therefore demanded that the company pay a further license fee of $5,975. This amount was based upon the state law requiring a fee of $50 for companies having capital stock of over $5,000, and $1 for each one thousand dollars of capital stock over $5,000. From the $6,045 so produced, credit was allowed for $70 paid in 1914, leaving a balance of $5,975.

The Hump Hairpin Manufacturing Company filed a bill in equity in the Circuit Court of Sangamon County to restrain the Secretary of State of Illinois from revoking its license to do business in the state, for nonpayment of the license fee; alleging that the basis of the fee burdens interstate commerce, deprives the company of property without due process of law, and denies the equal protection of the laws, in violation of the constitution of the United States. The bill was dismissed for want of equity, and the decree of the lower court was affirmed by the Supreme Court of Illinois in *Hump Hairpin Manufacturing Co.* v. *Emmerson*, 293 Ill. 387.

The contention of the company was and is that 90.10 per cent ($234,520.96) of its business is interstate com-

merce business; and that but 9.90 per cent ($25,814) of the business is transacted in the State of Illinois. All of the Company's tangible property is located in Illinois; and the company insisted that the statute of Illinois, construed in conformity with the constitution of the United States, required the averaging together of the 100 per cent of tangible property in the state with the 9.90 per cent of business transacted in the state, thus basing its license fee upon 54.95 per cent of its capital stock. Upon this basis the company would pay $3,272 instead of $5,975.

In denying relief to the Company, the Supreme Court of Illinois said:

> "It is admitted that all of appellant's commodities are manufactured within Illinois and that its sole business is the manufacture and sale of said commodities. It is also admitted that its only place of business is within this state, and that it maintains no office or place of business in any other state. It is also admitted that the sales of these commodities are conducted by traveling salesmen who take the orders of customers and send such orders to the office of appellant within this state for acceptance; that they are there accepted and the goods shipped from the office and factory in Illinois."
>
> "Under the general rule that a sale is made where the order is accepted and the goods shipped, it becomes evident that all of the sales of goods of appellant are made in Chicago. These sales are business transacted within this state and though some of these transactions also take on an Interstate character, yet all contain the element of sale which takes place within this state, and represent business done within this State. The manufacture of appellant's products in this State, the accepting of the orders and the completion of the contracts for sale in this state constitute the transaction of business in Illinois within the meaning of the Foreign Corporation Act. This being true, the whole of the capital stock is represented by property located and business transacted in this state." (Rec., 37; 293 Ill. 387, at p. 391.)

Upon the federal constitutional issues presented, the state court took the view that the state license fee here involved was sustainable under *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, and subsequent cases in line with that decision.

Under the agreed facts in this case, certain further facts of an essential character appear:

> (a) Since the issuance to it of the license in 1914, the company "has continuously been assessed by the taxing authorities of the State of Illinois upon all of its tangible property situate in said state, and has paid all taxes levied against it, and the tax demanded by the Secretary of State is in addition to the property taxes so paid * * * and not in lieu thereof." (Rec. 5, 26.)
>
> (b) The payment of the additional license fee is a condition of continuing to do business in the State of Illinois, and the Secretary of State is required to revoke the authority of the corporation to do business in the state, upon the non-payment of the fee.

While not directly involved in this case, it may be proper to state that the General Corporation Act of Illinois, enacted in 1919 (and slightly amended in 1921) imposes upon corporations organized in Illinois or admitted to do business therein, an annual license fee or franchise tax of "five cents on each one hundred dollars of the proportion of its capital stock, authorized by its charter in the office of the Secretary of State, represented by business transacted and property located in this State. * * *" This statute employs as the basis of an annual franchise tax the same plan as that now before the Court, and imposes this tax as a condition of doing or continuing to do business in the state, in addition to taxes on the property of the corporation. (General Corporation Act of Illinois, Secs. 105, 106, 108, 126. Illinois Laws, 1919, p. 312; 1921, p. 365.)

ASSIGNMENT OF ERRORS.

The following errors are assigned, and will be found on pages 42-43 of the Record:

1. The Supreme Court of Illinois erred in affirming the decree of the Circuit Court of Sangamon County dismissing Plaintiff in Error's bill for want of equity.

2. The Supreme Court of Illinois erred in failing and refusing to reverse the decree of the Circuit Court of Sangamon County dismissing Plaintiff in Error's bill for want of equity.

3. The Supreme Court of Illinois erred in holding that the entire capital stock of Plaintiff in Error is represented by property located and business transacted in the State of Illinois, although ninety (90) per cent of its goods are sold outside of the State of Illinois.

4. The Supreme Court of Illinois erred in holding that Section 5b of an Act entitled, "An Act to regulate the admission of foreign corporations for profit to do business in the State of Illinois," approved May 18, 1905, in force July 1, 1905, as subsequently amended by an Act approved June 22, 1917, in force July 1, 1917, as construed by the Circuit Court of Sangamon County of the State of Illinois, is a valid Act, and is not in conflict with or repugnant to the Fourteenth Amendment to the Constitution of the United States, and does not deprive Plaintiff in Error of its property without due process of law, and does not deny to Plaintiff in Error the equal protection of the laws.

5. The interpretation placed by the Supreme Court of Illinois in its said decision and judgment upon Section 5b of the Foreign Corporation Act of Illinois is erroneous, in that said statute as construed deprives Plaintiff in Error of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, and burdens interstate commerce contrary to Article 1, Section 8, Paragraph 3 of the Constitution of the United States.

ARGUMENT.

1. *The license fee in this case is one upon all capital stock of a foreign corporation, which makes more than ninety (90) per cent of its sales in interstate commerce; and total gross sales in both domestic and interstate commerce form one of two equal bases for the determination of the amount of the fee.*

This court accepts the decision of the Supreme Court of Illinois regarding the proper construction of the state statute here involved. The issue in this case is, whether the statute as construed by the Supreme Court of Illinois violates the Constitution of the United States, as burdening interstate commerce, denying the equal protection of the laws, or depriving of property without due process of law.

As construed by the Supreme Court of Illinois, the statute in this case imposes a license fee upon a foreign corporation measured by its total capital stock, although more than 90 per cent of the sales of the company are in interstate commerce. This is the result accomplished. Looking at the method of accomplishing that result, the state takes as one of the two equal factors in determining the license fee, all sales made by the company in both domestic and interstate commerce, although more than 90 per cent of these sales are interstate commerce transactions.

The statute results in taxing the total capital stock of the company. The rule as to this matter was clearly stated by this Court, in *International Paper Company* v. *Massachusetts*, 246 U. S. 135, at page 142:

"A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property, wherever located.

* * * * *

"True, those were cases where the business, interstate and local, in which the foreign corporation was engaged, was that of a common carrier. But the immunity of interstate commerce from state taxation is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies. And as respects the power of a state to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a state is wholly without power to impose such a tax."

Taking as it does the gross sales in both domestic and interstate commerce as one of the two equal bases for the license fee, although over 90 per cent of the sales are in interstate commerce, the license fee (as well as the annual franchise tax under the act of 1919) constitutes a direct burden upon gross sales in interstate commerce. Such sales are here counted as business transacted in the State of Illinois, and because they are so counted, serve as the basis for a tax $2,703 greater than if interstate commerce transactions were not included. If the proportion of interstate business becomes greater, the proportion of the tax it must bear becomes greater, though under the Illinois rule in this case the

total amount of the fee or tax remains the same. This is not a direct tax upon gross sales in interstate commerce, but by indirection accomplishes the same purpose, and brings this case within the rule recently applied by this Court in *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292. In the *Crew Levick* case this court held invalid so far as it affected foreign commerce an annual mercantile license tax upon the gross volume of business transacted. In this case the company had sold merchandise to the value of about $47,000 to purchasers within the state, and to the value of about $430,000 to customers in foreign countries. The Court properly said that so far as this tax was a direct burden upon transactions in foreign commerce it was improper; and that the portion of the tax "which is measured by the receipts from foreign commerce, necessarily varies in proportion to the volume of that commerce and hence is a direct burden upon it."

But it may be urged that the *International Paper Company* and the *Crew Levick* cases are not applicable here because all the tangible property of the Hump Hairpin Company is in Illinois, and all of its sales are made from an Illinois office. In the *Crew Levick* case the facts as stated by this court show that all sales were negotiated subject to the approval of the Philadelphia office and were filled from a warehouse located in the State of Pennsylvania; yet this did not justify a burden upon sales in foreign commerce. The facts of the *International Paper Company* case show that 86 per cent of the sales negotiated through the Massachusetts office of this company were in interstate commerce. Yet the fact that sales were negotiated or made through a Massachusetts office in no way justified a state excise tax upon the total capital stock of the company.

Heyman v. *Hays*, 236 U. S. 178, makes it clear that a state license tax upon interstate transactions is not justified merely by the facts that the goods are within the state, that orders are received within the state, shipment made therefrom, and payment for the goods received therein. In the *Heyman* case the Tennessee court took the view that the sales were completed in Tennessee (just as the Illinois court has held sales in the present case to be in Illinois), but this Court did not regard such a contention as material. In the *Heyman* case all of the sales were made in interstate commerce; in the present case more than 90 per cent of the sales were so made. The present case differs from the *Heyman* case in that here gross sales in interstate commerce are used as a basis for a license fee upon the total capital stock of a foreign corporation; whereas in the *Heyman* case was involved a county privilege tax for carrying on the wholesale liquor business, and in that case the business privilege tax would apparently have been sustainable if any domestic business had been transacted in Tennessee.

The license fee in this case is not a tax upon property, nor is it a license tax in the nature of an excise upon the conduct of a manufacturing business in the State of Illinois. In this respect, therefore, it is different from taxes upheld under the so-called "unit rule" in a number of cases, of which *Cudahy Packing Company* v. *Minnesota*, 246 U. S. 450, is one of the most recent; and it is also different from *American Manufacturing Company* v. *St. Louis*, 250 U. S. 459.

In the *Cudahy Packing Company* case, this Court sustained an act of Minnesota requiring the company to pay in lieu of other taxes a tax fixed at a stated per cent of its gross earnings from the operation of its car line within the state. In this case, as in other cases later referred to, in which this Court has upheld taxes based upon

gross receipts from both domestic and interstate commerce, the tax was a property tax upon property within the state's limits, in lieu of other taxes, and gross receipts were permitted to be employed as "a practical method of reaching and valuing that property, tangible and intangible, for taxing purposes." The license fee here involved is not a property tax, but is in addition to property taxes; and its payment is a condition of continuing to do business in the state.

In the *American Manufacturing Company* case was involved an ordinance of the City of St. Louis, passed under authority of a statute of the State of Missouri. This ordinance, in addition to a property tax, required every manufacturer to take out a license and to pay an annual license tax of $1 on each $1,000 of sales made during the preceding year irrespective of whether such sales were domestic or were in interstate commerce. The St. Louis ordinance was upheld by this Court as a "license tax in the nature of an excise upon the conduct of a manufacturing business" and the tax was said to be "the same in amount as if it were measured by the sale value of the goods." But this Court clearly did not hold that because manufacture may be taxed in the state, the whole capital stock of a foreign corporation may be taken as a basis for state taxation, though a large proportion of the corporation's business is in interstate commerce. The Court in fact makes it clear that no such result was intended; and expressly refers to the clearly distinguishable character of *Crew Levick Company* v. *Pennsylvania*, and *Looney* v. *Crane Company*. Nor can the case be construed as holding that because manufacture is not commerce, a state may burden interstate commerce through a tax ostensibly on manufacture, but actually on sales in interstate commerce. Such a line of division between state and national authority has never been recognized, and runs di-

rectly contrary to the decisions of this Court since *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211.

2. *The Illinois license fee upon foreign corporations derives no support from cases which within certain defined limits sustain state taxes measured in part by gross receipts derived from interstate commerce, or measured in part by total capital stock.*

In *International Paper Company* v. *Massachusetts*, 246 U. S. 135, at pages 141-2, this Court has succinctly stated the principle applicable to this case:

> "That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a state in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the state cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the state."

The Supreme Court of Illinois in upholding the use of gross receipts as a basis for the license fee here involved, relied chiefly upon *Maine* v. *Grand Trunk Railway Company*, 142 U. S. 217, and *United States Express Company* v. *Minnesota*, 223 U. S. 335. The Illinois Court quoted in part the last paragraph of the decision in *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292. It is well to quote here the whole of this paragraph:

> "So obvious is the distinction between this tax and those that were sustained in Maine v. Grand Trunk Railway Company, 142 U. S. 217; United States Express Company v. Minnesota, 223 U. S. 335; Baltic Mining Co. v. Massachusetts, 231 U. S. 68; Kansas City, Ft. Scott, and Memphis Railway Company v. Botkin, 240 U. S. 227; and some other cases of the same class, that no time need to be spent upon it."

The distinction between these cases and the *Crew Levick* case is obvious; but this fact does not aid the decision of the Illinois Supreme Court in the case now before this Court. The cases so distinguished from the *Crew Levick* case fall into two classes: first, those using gross receipts to some extent as a measure of state taxes; and, second, those using total capital stock to some extent for the same purpose.

In *Maine* v. *Grand Trunk Railway Company*, 142 U. S. 217, this Court upheld a tax based upon or measured by gross receipts, derived from both domestic and interstate commerce. This Court, in *Galveston, Harrisburg and San Antonio Railway Company* v. *Texas*, 210 U. S. 217, at page 226, explains the *Grand Trunk Railway* case as employing gross receipts to measure the value of property, and says that the tax scheme of the state involved in the *Grand Trunk* case "fairly may be called a commutation tax." In *United States Express Company* v. *Minnesota*, 223 U. S. 335, a gross receipts tax in lieu of all taxes upon the property of express companies was sustained upon the ground that gross receipts were employed as a measure of the value of the property. In this case the Court again explains the result in the *Grand Trunk* case. With reference to taxes measured by gross receipts, this Court has taken the same view in *Wisconsin and Michigan Railway Company* v. *Powers*, 191 U. S. 379; *Cudahy Packing Company* v. *Minnesota*, 246 U. S. 450; and *Northwestern Mutual Life Insurance Company* v. *Wisconsin*, 247 U. S. 132. In the last case just cited, the Court made the following statement:

> "The construction of the act by the state court brings the case within the decisions of this court in United States Exp. Co. v. Minnesota, 223 U. S. 335; Cudahy Packing Co. v. Minnesota, decided April 15, 1918 (246 U. S. 450). In the former case a commutation tax upon gross receipts of the express company from state and interstate business was sus-

tained as casting no burden upon interstate commerce. In the Cudahy Packing Co. Case a tax of like character was held not a burden upon interstate commerce, although much of the gross receipts, which measured the property tax, was derived from such commerce. In both of these cases, following the previous decisions of this court, the tax was held to be within the authority of the state, and the inclusion in the measure of taxation of the receipts partly derived from interstate commerce was held not to invalidate the tax, its amount not being in excess of what would be legitimate as an ordinary tax on the property taken at its value."

It should be noted that the license fee here involved is in addition to property taxes (as is also the annual franchise tax imposed upon the same basis by Illinois legislation of 1919). When an effort was made to employ gross earnings as a basis of state taxation, in addition to property taxes, this was held bad in *Meyer* v. *Wells, Fargo and Company*, 223 U. S. 298. The case now before the Court falls within the rule of this decision.

Let us turn now to cases in which this Court has sustained state laws using total capital stock to some extent as a measure of state taxes. In *Baltic Mining Company* v. *Massachusetts*, 231 U. S. 68, a Massachusetts excise tax based upon the whole capital stock of a foreign corporation was upheld largely because the maximum amount of the tax was limited, the authorized capital being regarded by the court as merely the measure of a tax. This Court took the same view under similar conditions, in *Kansas City, Ft. Scott and Memphis Railway Company* v. *Botkin*, 240 U. S. 227. No conflict with the *Botkin* case is presented by *Kansas City, Memphis and Birmingham Railroad Company* v. *Stiles*, 242 U. S. 111, where this Court upheld a state franchise tax based upon total capital stock, where the franchise tax was "levied upon a corporation consolidated under the laws of the state by its own acceptance of that law in incorporating under it."

A statutory maximum tax was largely the basis of the decision of this Court in the *Baltic Mining Company* case. When Massachusetts legislation removed the maximum, and applied the excise tax without limit against the total capital stock, the tax was held invalid in *International Paper Company* v. *Massachusetts,* 246 U. S. 135. This case and *Looney* v. *Crane Company,* 245 U. S. 178, are clear authorities against the power of a state to levy a tax without limit upon the whole capital stock of a foreign corporation. It may be worth noting that the Texas statute involved in the *Looney* case was similar to the Illinois statute here involved, in that it related to a tax to be paid for the right to continue doing business in the State of Texas.

This Court in distinguishing the tax upon all capital stock without limit in the *International Paper Company* case from taxes based upon total capital stock, but limited in some other respect, quoted from the *Looney* case as follows:

> "In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the constitution which was found to exist, resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. These conditions related to the subject matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied."

In distinguishing the issue in the *Baltic Mining Company* case from that in the *International Paper Company* case, the Court said in 246 U. S., on page 145:

> "True, the tax sustained in Baltic Mining Co. v. Massachusetts was imposed under the first of the statutes now in question, the one of 1909; but at that

time the statute placed a maximum limit on the amount of the tax, which, as shown in that and other cases, was a material factor in the decision. This limitation, as the state court holds, was removed by the Statute of 1914, which also made a partial reduction in the tax rate. Since then the tax has been assessed on the par value of the entire authorized capital at 1/50 of 1 per cent up to $10,000,000, and at 1/100 of 1 per cent for the excess. Accepting the state court's view of the change wrought by the later statute, it is apparent that since 1914 the Massachusetts law has been in its essential and practical operation like those held invalid in 1910 in Western U. Teleg. Co. v. Kansas; Pullman Co. v. Kansas; and Ludwig v. Western U. Teleg. Co., and like that held invalid at the present term in Looney v. Crane Co."

The tax now before the Court is one falling upon total capital stock, and is not in lieu of other taxes, nor has it any maximum limit imposed by law. Such a tax is not sustained by the line of decisions following *Baltic Mining Company* v. *Massachusetts*, but rather falls within the class of taxes condemned under *International Paper Company* v. *Massachusetts*.

3. *The tax involved in this case receives no support from decisions of this Court sustaining state taxes on net income, even though such net income is partly derived from interstate commerce.* It should be noted that the tax now before the court is a license fee for the privilege of doing or continuing to do business. Section 5b of the Illinois Act of 1917 was directly under construction in this case. Section 5c of the same act provides that:

> "if the amount due is not paid within thirty days after the date of the receipt of said notice, or within such extension of time as may be granted, the Secretary of State shall revoke the authority of such corporation to do business in Illinois, and shall file with the certified copy of the charter of the corporation on file in his office a certificate of revocation, and

> thereafter said corporation shall not be entitled to transact business in this state without paying fees for and obtaining a new certificate of authority."

It should also be noted that one of the two equal factors in determining the amount of capital stock upon which the license fee is to be based is "the percentage of the total business of the corporation transacted in Illinois." This language as interpreted by the State Supreme Court in this case means gross receipts from business, domestic and interstate, transacted from an Illinois office.

These two elements of gross receipts and payment of the fee as a condition of doing business, clearly distinguish this case from *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321, and *Underwood Typewriter Company* v. *Chamberlain*, 254 U. S. 113.

In the *United States Glue Company* case the State of Wisconsin levied an income tax upon the corporation, using substantially the same rule as that of the Illinois statute for determining the proportion of capital stock employed in the state. This will be made clear by a quotation from the decision:

> "In order to determine what part of the income of a corporation engaged in business within and without the state (other than that derived from rentals, stocks, bonds, securities, etc.) is to be taxed as derived from business transacted and property located within the state, reference is had to a formula prescribed by another statute, for apportioning the capital stock of foreign corporations, under which the gross business in dollars of the corporation in the state, added to the value in dollars of its property in the state, is made the numerator of a fraction of which the denominator consists of the total gross business in dollars of the corporation both within and without the state, added to the value in dollars of its property within and without the state. The resulting fraction is taken by the income tax law

as representing the proportion of the income which is deemed to be derived from business transacted and property located within the state." (Pages 324-325.)

The income tax in this case was admittedly based in part upon income derived from goods sold to customers outside of the state, although delivered from the company's factory within the state.

The Court in this case held the Wisconsin statute proper, but drew a clear line between cases in which the tax burdens commerce, and in which the tax is merely one upon net income from commerce. The Court said:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably, it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

The court further said with reference to this tax:

"It was measured not by the gross receipts but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business." (Pages 328-329.)

Similar statements will be found in *Shaffer* v. *Carter*, 252 U. S. 37, at page 57.

The same distinction is made by this Court in the *Underwood Typewriter Company* case. The essential facts in this case are as follows: The Connecticut income tax law determines the proportion of income to be paid by the corporation, upon the basis of the proportion of its tangible property in Connecticut to the total amount of such property owned by the company. All of the company's manufacturing was done in Connecticut; although its principal office was in New York, and the company itself was a Delaware corporation. In these respects the situation is not dissimiliar from that now before the Court. In its return for 1916 the company reported the fair cash value of its real estate and tangible personal property in Connecticut as $2,977,827.67, and the value of such property outside of the state as $3,343,155.11. The proportion was therefore 47 per cent, and 47 per cent of the net earnings were taken as the basis for income taxation in Connecticut; although of the $1,293,643.95 of net receipts of the company, only $42,942.18 were actually upon business in Connecticut.

In upholding this basis of apportionment, the Court said:

> "Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate commerce. Its enforcement is left to the ordinary means of collecting taxes. * * * This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part or indeed mainly from interstate commerce is settled."

It will be seen that in both the *United States Glue Company* case and in the *Underwood Typewriter Company* case, the Court emphasized the fact that the tax was based upon net income, and did not actually place a bur-

den upon gross transactions in interstate commerce. The case now before the Court is different in that one of the two equal factors for the determination of the tax is gross receipts from business more than 90 per cent of which is transacted in interstate commerce. The construction by the Supreme Court of Illinois makes this clear. This case, therefore, falls more distinctly on the side of the *Crew Levick* case than it does with the cases just commented upon involving Wisconsin and Connecticut laws imposing taxes upon net income.

It should also be noted that in the *Underwood Typewriter Company* case, this Court expressly points out that the "payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate commerce. Its enforcement is left to the ordinary means of collecting taxes." In the present case is involved a license fee, payment of which is a condition of continuing to do business within the state.

4. *The license fee here imposed upon a foreign corporation by the State of Illinois is, if due, paid once for all; but the principle is one of continued application; and if recognized will lead to annual burdens upon interstate commerce and upon business not transacted in the state*

Under the Illinois statute, as construed by the Supreme Court of that state, the license fee here involved imposes a serious burden upon the business of this corporation not transacted in the State of Illinois, and the business so burdened is interstate commerce business. If such a plan is recognized, the same construction is of necessity sustained with respect to the annual franchise tax imposed by Illinois legislation of 1919, as slightly amended in 1921. This is made plain by quoting from sections 105 and 106 of the General Corporation act of Illinois:

"Sec. 105. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its capital stock, authorized by its charter in the office of the Secretary of State, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or business in this State." (Illinois Laws, 1921, page 375.)

"Sec. 106. In ascertaining the amount of the authorized capital stock represented by business transacted and property located in this State, the sum of the business of any foreign or domestic corporation transacted in this State and the total tangible property of such corporation located within this State shall be divided by the sum of the total business of the corporation, and the total tangible property of the corporation wherever situated." (Illinois Laws, 1919, page 340.)

This law adopts for an annual franchise tax the same plan as that involved in this case. If this Court upholds the construction given to the Act of 1917 by the Supreme Court of Illinois, it sustains for Illinois and other states a basis of taxation which permits gross receipts from business done in interstate commerce to be taken as a basis for a state capital stock tax; and at the same time permits a tax measured in large part by business done in other states. In this case the tax is one upon total capital stock, although under the decisions of this Court, such a basis of taxation is not permitted.

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

COLIN C. H. FYFFE,
Counsel for Plaintiff in Error.

Chicago, January 4, 1922.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

No. 139.

HUMP HAIRPIN MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.

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I.

ARGUMENT.

The license or franchise tax under the Illinois Statute is not a tax upon all of the capital stock of the foreign corporation or upon its gross receipts.

The Illinois Statute provides in effect that all foreign corporations which are authorized to do business in the State shall pay a license or franchise fee or tax upon that part or proportion of the capital stock actually represented by property located and business transacted in the State of Illinois. (Brief for Plaintiff in Error, p. 2.) This is a very different thing from a franchise tax or fee upon the entire capital stock of the corporation without regard to the property located in the State or the business transacted therein.

In *American Can Company* v. *Emmerson*, 288 Ill., 289, at page 300, the Court, in construing the same provision of the Statute, said:

> "It is also urged by appellant that the tax here in question is an unlawful interference with inter-State commerce, on the ground that the tax assessed is measured by the percentage of its authorized capital stock, and that the tax imposed is a tax upon not only its capital, property and business represented in Illinois, but likewise its capital, property and business in other States. It will be seen that the amount of this fee or tax required to be paid by appellant is measured, as provided by the act, by a percentage of that proportion of its entire capital stock which is represented in the State by its property and business within the State. Such fee is not computed upon the entire capital stock but upon a fraction of that stock, and that fraction such as is represented within this State. It is evident that the only circumstances under which the legislature intended that a foreign corporation should be taxed upon all of its capital stock would be where it had transferred all its business and property to this State. If, from the mere fact that this license fee or tax must be paid out of the earnings of the company, it should be held that it was therefore a tax upon the whole capital stock of the corporation, then it would be impossible to levy any fee on a foreign corporation for privilege to do business in this State, as any such fee or tax, because paid out of the earnings of the corporation, would be a burden upon inter-State commerce. Such is not the law. The right of States to levy such fee has been universally recognized."

The basis of the decision of the Supreme Court of Illinois in the case at bar is shown by the following portion of the opinion:

> "The question arising here is whether or not all of the capital stock of appellant is represented by the property located in this State and by business transacted in this State. If the property located and the business transacted in Illinois represent its entire capital stock, then appellant is required to pay a fee computed on its entire capital stock. If, on

the other hand, when the percentage of the total business of the corporation transacted in Illinois is averaged with the total tangible property located in this State it is found that not all of the capital stock is being so represented, then only that portion which is so represented can be taken as a meausure of the fee to be assessed in this case.

It being admitted that the entire tangible property of appellant is within the State, we come to a consideration, therefore, of the question whether or not all the capital stock of the corporation is represented by business transacted within this State within the meaning of this act. It is admitted that all of appellant's commodities are manufactured within Illinois and that its sole business is the manufacture and sale of said commodities. It is also admitted that its only place of business is within this State and that it maintains no office or place of business in any other State. It is also admitted that the sales of these commodities are conducted by traveling salesmen, who takes the orders of customers and send such orders to the office of appellant within this State for acceptance; that they are there accepted and the goods shipped from the office and factory in Illinois. Under the general rule that a sale is made where the order is accepted and the goods shipped, it becomes evident that all of the sales of goods of appellant are made in Chicago. These sales are business transacted within this State, and though some of these transactions also take on an interstate character, yet all contain the element of sale which takes place within this State and represent business done within this State. The manufacture of appellant's products in this State, the accepting of the orders and the completion of the contracts for sale in this State constitute the transaction of business in Illinois within the meaning of the Foreign Corporation act. This being true, the whole of the capital stock is represented by property located and business transacted in this State." (*Hump Hairpin Manf. Co.* v. *Emmerson,* 293 Ill., pp. 390-391; Rec. 37.)

II.

The Illinois Statute and its construction by the Supreme Court of Illinois does not place a burden upon interstate commerce in violation of the Constitution of the United States.

In the case of *American Can Company* v. *Emmerson*, 288 Ill., 289, the Illinois Supreme Court had this exact question under consideration, it being contended that the operation of said Section 5b of the Foreign Corporation act (the section here in question) creates and imposes a burden upon interstate commerce.

That court in its opinion, after citing and quoting from *United States Express Co.* v. *Minnesota*, 223 U. S., 335, *Maine* v. *Grand Trunk Railway Co.*, 142 U. S., 217, and *Wisconsin and Michigan Railway Co.* v. *Powers*, 191 U. S., 379, at page 303, said:

> "The rule adopted by the United States Supreme Court is, that while the State may not regulate inter-State commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. *Kansas City Railroad Co.* v. *Stiles*, 242 U. S., 111; *Northwestern Mutual Co.* v. *Wisconsin*, 247 id., 132; *United States Glue Co.* v. *Oak Creek*, 247 id. 341; *Baldwin Tool Works* v. *Blue*, 240 Fed. Rep., 202."

The case of *Maine* v. *Grand Trunk Railway*, 142 U. S., 217, is directly in point on principle. In that case the law required that every railroad corporation operating within the state should pay an annual excise tax for the privilege of exercising its franchise therein, based upon a proportion of its gross transportation receipts derived from its entire business, state and interstate. The defendant was a foreign railroad corporation. The Court in sustaining the validity and constitutionality of the tax, speaking by Mr. Justice Field, at page 227, said:

"The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy there can be no question. * * The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed.

"The Court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign

commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. * * * There is no levy by statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

In *U. S. Express Co.* v. *Minnesota*, 223 U. S., 335, the Court held that while a state may not burden interstate commerce by taxing it, yet it may measure the value of the property of a corporation engaged in interstate commerce within the state by its gross receipts, including receipts from interstate commerce, and impose a tax thereon. In its opinion the Court cites a number of cases which held that states may not pass laws that impose a tax upon the conduct of interstate commerce, and then says, at page 343:

"While we have no disposition to detract from the authority of these decisions, this Court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the State by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce.

"In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S., 217, this Court sustained a tax which required every railroad operated within the State to pay an annual tax for the privilege of exercising its franchises therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the State, such gross receipts being derived from its entire business, state and interstate. The resort to the gross receipts, in the opinion of the Court, was

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merely a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the State.

"In *Wisconsin & Michigan Railway Co.* v. *Powers*, 191 U. S., 379, a tax was sustained which made the income of the railway company within the State, including interstate earnings, the *prima facie* measure of the value of the property within the State for the purpose of taxation. In the course of the opinion this Court said (p. 387):

"'In form the tax is a tax on "the property and business of such railroad corporation operated within the State," computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S., 217.'"

In *Kansas City, etc. R. R. Co.* v. *Stiles*, 242 U. S., 111, a statute of Alabama which imposed an annual franchise tax upon all domestic corporations based upon their entire capital stock, was under consideration. It was urged that said franchise tax was unconstitutional as imposing a burden upon interstate commerce, inasmuch as the capital stock represented property and business not in Alabama. The Court in upholding the constitutionality of the statute, at page 118, said:

"It is urged that this tax is void because it undertakes to tax property beyond the jurisdiction of the State, and imposes a direct burden upon interstate commerce. Objections of this character were so recently discussed, and the previous cases in this Court considered, in *Kansas City, etc. Railway Co.* v. *Kansas*, 240 U. S., 227, that it would be superfluous to undertake extended discussion of the subject now. In that case, after a full review of the previous decisions in this Court, it was held that each case must depend upon its own circumstances, and that while the State could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the State. As to the objection based upon the due process clause of the Constitution, we

think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the State is in part measured by the capital stock representing property owned in other states."

Also, at page 119:

"So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City etc. Railway Co.* v. *Kansas, supra,* is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

In *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S., 132, a statute provided that domestic life insurance companies in that state should pay an annual license tax in lieu of all other taxes, except real estate taxes. In upholding the tax the Court, at page 137, said:

"It is insisted that because of the foreign investment business of the company, large in amount, and involving shipments of securities, correspondence, etc., beyond the State, this law burdens interstate commerce. We need not reiterate the reasoning upon which this court has repeatedly held that a State may not by its system of taxation impose burdens upon interstate commerce, the cases have been recently reviewed and the doctrine reaffirmed. *Looney* v. *Crane Co.,* 245 U. S., 178; *International Paper Co.* v. *Massachusetts,* 246 U. S., 135; *Cheney Brothers Co.* v. *Massachusetts,* 246 U. S., 147.

"The construction of the Act by the state court brings the case within the decisions of this Court in *U. S. Express Co.* v. *Minnesota,* 223 U. S., 335; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S., 450. In the former case a commutation tax upon gross receipts of the express company from state and interstate business was sustained as casting no burden upon

interstate commerce. In the *Cudahy Packing Co. Case* a tax of like character was held not a burden upon interstate commerce, although much of the gross receipts, which measured the property tax, was derived from such commerce. In both of these cases, following the previous decisions of this court, the tax was held to be within the authority of the State, and the inclusion in the measure of taxation of the receipts partly derived from interstate commerce was held not to invalidate the tax, its amount not being in excess of what would be legitimate as an ordinary tax on the property taken at its value."

"We have said thus much as to the alleged invalidity of this license tax as a burden upon interstate commerce, without deciding, as we do not find it necessary to decide, whether the so-called foreign investment business of the company does or does not of itself amount to interstate commerce. If it amounts to commerce of that character no burden is cast upon it by such tax as is here involved, since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the State."

In *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, the State law imposed a tax at a stated percent of its gross earnings from the mileage within the State in lieu of other taxes on the property so engaged. This court held that the tax was not unconstitutional as a burden on interstate commerce, and on page 453, said:

"In so far as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the State, although chiefly devoted or applied to interstate transportation. *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S., 18; *Adams Express Co.* v. *Ohio,* 165 U. S., 194; s.c., 166 U. S., 185; *American Refrigerator Co.* v *Hall,* 174 U. S., 70; *Union Refrigerator Co.* v. *Lynch,* 177 U. S., 149. This is not questioned; but it is insisted that the tax imposed is not a property tax but one laid directly on the gross earnings. Of course, if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconsti-

tutional restraint or burden on such commerce and void. *Fargo* v. *Michigan*, 121 U. S., 230; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S., 326; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S., 217. On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index, or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this Court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350, 367; *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S., 379, 387; *Fargo* v. *Hart*, 193 U. S., 490, 499; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, *supra*."

Counsel say this case is to be distinguished because it is a property tax in lieu of other property taxes. But in the case at bar the tax is a franchise tax and its value is measured for taxing purposes by the proportion of the property and business of the corporation held and transacted in the State. There is no difference whatever in principle between the measuring of a tax on property, subject to taxation by the State, in part by the income from interstate commerce carried on by the corporation within the State, and the measuring of a tax on a franchise, which is also subject to taxation by the State, in part by the interstate commerce business carried on by the corporation within the State. In *Maine* v. *Grand Trunk Railway Co.*, *supra*, the tax was a franchise tax for the privilege of carrying on business by the foreign corporation in the State, while in the *U. S. Express Company v. Minnesota*, *supra*, and *Cudahy Packing Co.* v. *Minnesota*, *supra*, the tax was a tax on the property of the foreign corporation.

III.

The cases cited and quoted from by counsel in which statutes have been held to be unconstitutional because the franchise fee or tax was based and computed upon the entire capital stock of the corporation have no bearing upon the case at bar.

Counsel cite and quote from *International Paper Company* v. *Massachusetts,* 246 Ill., 135. In that case the Massachusetts statutes imposed upon foreign corporation an annual excise tax at the rate of one-fifteenth of one percent of the par of the authorized capital stock up to $10,000,000, and one-hundredth of one percent of the par value of all such stock in excess, being a tax in varying percentages upon the entire authorized capital stock of the foreign corporation. The statute imposed the tax upon the entire capital stock without regard to the property and business of the corporation in the State. This Court held, in effect, that because the Massachusetts statute provided for a tax upon the entire authorized capital stock of the corporation, without regard to whether the property and business of the foreign corporation were within or without the State, it was a tax on all its property and business including property not in the State and upon interstate commerce, and was therefore unconstitutional. But this Court did not hold, and it has never held, that an excise tax based upon the proportion of the capital stock of the corporation represented by its property and business in the State is a burden on interstate commerce.

The decision of the Court in *International Paper Co.* v. *Massachusetts, supra,* was based largely upon the decision in *Western Union Telegraph Co. v. Kansas,* 216 U. S., 1, in which the facts were as follows:

The Western Union Company having an authorized capital stock of $1,000,000, was doing and for years had been doing, interstate and intrastate business in Kansas.

A law was passed requiring foreign corporations to pay to the State Treasurer.

> "A charter fee of one-tenth of 1 per cent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of 1 per cent; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars." (p. 4.)

This latter rate of two hundred dollars per million is one-fiftieth of 1 per cent. It thus appears that the fee was based upon varying percentage of the entire authorized capital stock represented by its property and business everywhere. It was not based upon, and had no relation to, the proportion of the capital stock represented in the State by the property located and business transacted therein. This is the real basis of the decision as is shown by the following from the opinion of the Court (p. 30):

> "The express words of the statute leave no doubt as to what is the basis on which the fee, specified in the state statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital, that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and, in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent of its whole authorized capital, repre-

> senting all of its property and all its business and interests everywhere."

Counsel also cite and quote from *Looney* v. *Crane Company*, 245 U. S., 178, as an authority against the power of the State to impose a tax without limit upon the whole capital stock of a foreign corporation. But the statute in that case was clearly different in principle and application from the law in the case at bar. There the Texas statute imposed a franchise tax at a fixed percentage of the entire authorized capital stock of the corporation, and in case the issued and outstanding stock, plus the surplus and undivided profits, exceed the authorized capital stock, the tax was a fixed percentage upon the entire outstanding stock, surplus and profits. This Court in its opinion, at page 185, says:

> "The total assessed value in Texas of its real estate, money there employed and merchandise there held amounted to $301,179. The company's gross receipts and gross sales in all its business in all the states for the year 1913 amounted to $39,831,000, of which only $1,019,750 had any relation to the State of Texas and nearly one-half of this amount was the result of transactions purely of an interstate commerce character, arising from the sale and shipment of goods from other states to purchasers in Texas who ordered them and from the shipment from Texas to other states for the purpose of filling orders sent from such states."

The Court under said law and facts of course held that the tax was unconstitutional, being a tax upon all the capital of the corporation without any regard whatever to the location of that capital or of the property in which it was invested. It was clearly a burden upon interstate commerce and a taxing of property and business beyond the jurisdiction of the State.

In the case at bar, neither the law nor the facts are similar to those in *International Paper Co.* v. *Massachusetts, supra*, and *Looney* v. *Crane Company, supra*. Here the tax is based and computed not upon the entire

authorized capital stock, but only that part of such authorized capital stock which is represented by the property and business of the corporation actually located and transacted in the State. We respectfully submit that *International Paper Co.* v. *Massachusetts* and *Looney* v. *Crane Company, supra,* do not show or tend to show that the said law of the State of Illinois as construed by its Supreme Court, places any restraint or burden upon interstate commerce.

Counsel also urge that the case at bar falls within the principles applied in the case of *Crew Levick Company* v. *Pennsylvania,* 245 U. S., 292. But this contention is clearly erroneous. In that case the tax was a direct tax upon every sale in interstate commerce. A part of every dollar received from sales in interstate commerce must go to pay the tax. But in the case at bar the law does not so provide for a direct tax at all. The value of the franchise is merely measured by the business transacted in the State, whether in interstate commerce or not. In Crew Levick Company case, at page 295, this Court said:

> "* * * the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this Court that it is necessary to do little more than refer to a few of the most pertinent." (Citing cases).

In discussing the character of the tax, the Court, at page 297, said:

> "It bears no semblance of a property tax, or a transaction in commerce by withholding, for the use franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. *It operates to lay a direct burden* upon every

> of the State, a part of every dollar received in such transactions."

The distinction between this case and the case at bar is too obvious to need discussion.

Counsel cite the case of *Heyman* v. *Hays*, 236 U. S., 178. But in that case the tax was a license tax upon a corporation which was transacting in the State only business in interstate commerce. That case falls within the rule that a State may not impose a license fee or tax upon a corporation which transacts in the State only an interstate commerce business.

IV.

The fact that the Illinois statute provides for cancellation of the authority to transact business in the State for failure to pay the tax does not render the law unconsitutional.

Counsel call attention to Section 5c of the Illinois Act of 1917 which provides that if the tax is not paid in thirty days or within such extension of time as may be granted "the Secretary of State shall revoke the authority of such corporation to do business in Illinois, and shall file with the certified copy of the charter of the corporation in file in his office a certificate of revocation," etc.

The Supreme Court of Illinois has not passed upon or construed said provision. Under the decision and rule laid down by this court in *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350, said provision must be construed as authorizing the revocation and cancellation of power and authority to transact intrastate business and not both intrastate and interstate business.

In that case in construing a similar provision of the Arkansas statute, the court, at page 368 *et seq*, said:

> "But the State court has not yet construed the section as calling for the forfeiture of the privilege of doing interstate business in the event of non-pay-

> ment of the franchise tax. Nor is the State here insisting upon such a construction. * * * And in exercising the jurisdiction conferred by Section 237, Jud. Code, it is proper for this court to wait until the State court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution. * * * * At present, therefore, we have merely to consider whether Section 20 so clearly requires a forfeiture of the interstate franchise for non-payment of the tax in question that it is not reasonable to anticipate that the State court will put another construction upon it. And in doing this we ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon State action by the Federal Constitution, or that the courts of the State will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the lawmaking body, the courts should adopt that which is consistent with the constitution, because it is to be presumed that the legislature intended to act within the scope of its authority."

After considering and reviewing the language and scope of the Arkansas law the court, at page 370, said:

> "In view of all these considerations, we ought to assume, until the State, through its judicial or administrative officers, places a different construction upon the act, that Section 20 will be limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality will be treated as severable from the other provisions of the act."

This case and the above quoted language is so clearly and completely applicable to the case at bar that it seems that no further argument or citation of authority is necessary.

In conclusion, it is respectfully submitted that the

franchise of the Plaintiff in Error is a proper subject of taxation; that the Illinois Statute does not base the tax upon the entire capital stock or the entire gross receipts of the corporation; that the method of taxation provided by the Illinois statute merely measures the value of the franchise by the portion of the capital stock of the corporation represented by the property and business located and transacted in the State; that the tax upon the proportion of the capital stock represented in Illinois in part by the business of appellant transacted in Illinois did not directly or necessarily place a restraint or burden upon interstate commerce, even though a part of such business resulted in interstate commerce shipments; that the said law and enforcement thereof by the Secretary of State in this case falls within the rule of the Supreme Court of the United States that

> "The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character." (*Kansas City etc. R. Co.* v. *Stiles*, 242 U. S., 111, 119);

and that there is nothing in the nature and character of the tax, and there are no circumstances in this case which indicate any purpose or necessary effect in the tax imposed to burden interstate commerce.

Respectfully submitted,

EDWARD J. BRUNDAGE,

Attorney General of the State of Illinois.

Counsel for Defendant in Error.

HUMP HAIRPIN MANUFACTURING COMPANY *v.* EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 139. Argued March 2, 3, 1922.—Decided March 27, 1922.

1. Error of state authorities in treating interstate as intrastate business in computing a corporation excise tax under a statute meant to include the latter only in the computation, goes to the constitutionality of the tax and not of the statute. P. 293.

2. Business done by a corporation through orders approved in a State where its tangible property and business office were located and its manufacturing conducted, but first obtained by its salesmen from residents in other States, *held* interstate. P. 294.
3. Where a state law for taxing foreign corporations for the privilege of doing local business bases the tax upon the capital stock actually represented by property located and business transacted within the State, plainly intending not to tax interstate commerce, and is reasonable as to amount and free from discrimination in favor of local corporations, a tax assessed under it will not be unconstitutional merely because a trifling part resulted from inclusion of interstate business in the basis of computation. P. 295.

293 Ill. 387, affirmed.

ERROR to a judgment of the Supreme Court of Illinois in a suit brought by the plaintiff in error to recover the amount of a tax.

Mr. Colin C. H. Fyffe for plaintiff in error.

Mr. Clarence N. Boord, with whom *Mr. Edward J. Brundage,* Attorney General of the State of Illinois, was on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1918 the defendant in error, as Secretary of State, assessed a tax of $6,045 upon the plaintiff in error, a corporation organized under the laws of West Virginia, for the privilege of doing business in the State of Illinois. The tax was paid under protest and this suit was instituted to recover the amount of it, based upon the contention that the statute under which it was imposed offends against the Federal Constitution for various reasons, the only one argued in this court, however, being that, if given effect, it will constitute a regulation of, and impose a direct burden upon, interstate commerce.

The case was tried on stipulated facts, from which we derive these as essential to a disposition of it.

In 1918 the authorized capital stock of the company was $6,000,000, of which $5,500,000 was reported by the company to the State as paid in and issued. It was a manufacturing corporation, with all of its tangible property in Illinois. Its method of doing business was to send salesmen into Illinois and the various other States to solicit orders, which, however, were not accepted until approved at the Chicago office, after which they were filled from stocks maintained in that city. The company represented the potential value of its patent rights, licenses, trademarks, secret processes and good will as $5,124,126.72, and the total value of its real and personal property as $416,629.07,—making a total in Illinois of $5,540,755.79. It also represented the total sales made by it in 1917, on which year's business the tax was computed, as $263,334.96, and of these $25,814 were made to residents of Illinois.

The statute under which the tax was assessed reads:

"It shall be the duty of the Secretary of State to propound interrogatories from time to time to officers of such foreign corporations [with negligible exceptions] doing business in this State to ascertain the proportion of capital stock actually being represented by property located and business transacted in the State of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this State." (Hurd's Statutes, 1917, p. 719, § 67 fb.)

In a recent case, *American Can Co.* v. *Emmerson*, 288 Ill. 289, the Supreme Court of Illinois held that it has been the policy of that State since 1872 to accord precisely equal treatment to domestic and foreign corporations of like character (Hurd's Statutes, 1917, p. 703, § 26,) and that the fees for transacting business in the State are computed on the amount of the authorized capital stock

of domestic corporations and, at the same rate, on the amount of the capital stock of foreign corporations actually "represented by property located and business transacted" in the State, as determined by the Secretary of State under the statute. The basis for the computation was $50 for the first $5,000, and $1 upon each $1,000 over that amount.

Acting under these statutes, the Secretary of State concluded that, under the facts as we have stated them, all of the business of the company was "transacted" in the State of Illinois and, all of the tangible property of the company being in the State, he computed the tax on the entire authorized capital stock. The State Supreme Court sustained the assessment as valid.

The contention of the plaintiff in error in this court is that, notwithstanding the manner in which it was done, the business which the company did with residents of States other than Illinois was interstate business and that the treating of the amount of it as a part of the business of the company transacted in that State in determining the percentage of the total business of the corporation transacted therein, renders the act under which the computation was made unconstitutional and void for the reason that the tax assessed is a burden upon interstate commerce.

Plainly this contention cannot be sustained. The statute and the state Supreme Court both show a candid purpose to differentiate state from interstate business and to use only the former in determining the amount of the disputed tax. If the Secretary of State or the court, in computing the tax, erroneously treated as intrastate that which was really interstate business, such error would be reason in a proper case for correcting the computation, but would not justify declaring the act unconstitutional. The facts, that all of the property of the company was located in Illinois, that all of its manufacturing operations

were conducted in that State, and that all contracts of sale must be approved at Chicago, where the only business office of the company was maintained, certainly reduce the interstate element in its business to the lowest terms, but, nevertheless, we are constrained to hold that the business done with residents of States other than Illinois is interstate business, and therefore, there remains the question, Whether the use made of the amount of such interstate business, in determining the amount of the tax, renders it invalid?

While a State may not use its taxing power to regulate or burden interstate commerce (*United States Express Co.* v. *Minnesota*, 223 U. S. 335; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 343; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 326–327. The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon

it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.

No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of States other than Illinois be regarded as interstate.

Clearly the statute is not a disguised attempt to tax interstate commerce. On the contrary, its purpose plainly is to differentiate state from interstate business and to impose the tax only on the former. Construed with other statutes the act accords equal treatment to domestic and foreign corporations, and clearly in this case property of the company beyond the jurisdiction of the State is not taxed—all of its property is in Illinois. To require foreign corporations to pay for the privilege of doing business in a State is, of course, a familiar and often approved form of taxation, and in this case the fee imposed is reasonable in amount.

The tax is not imposed directly upon the proceeds of interstate commerce and is not computed upon it. The $235,000 of interstate business of the company is only one of three factors used in estimating or measuring "the amount of the capital stock represented by property and business transacted in Illinois," upon which the privilege tax in dispute was computed. The other two factors were $5,540,000 of property in Illinois and $25,000 of business stipulated as done with residents of that State. If the fee or privilege tax were computed at the statutory rate on the whole of the interstate business, it would be trifling in amount, but if computed on the property admitted to

have been in use in the State it would be but slightly less than the tax collected.

If this same amount of tax had been imposed upon such a manufacturing corporation as we have here without reference being made to the basis of its computation, very certainly no objection to its validity would have been thought of (142 U. S. *supra*, p. 229). Or if the State had imposed an income tax, a part of which would have been derived from the net profits on this same interstate business, no valid objection could have been made to it. (*United States Glue Co.* v. *Oak Creek, supra.*) At most the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant and it is therefore constitutional. The judgment of the Supreme Court of Illinois must be

Affirmed.

MR. JUSTICE VAN DEVANTER dissents.

MR. JUSTICE MCREYNOLDS concurs in the result.